

ROBERT BACHARACH
WEDNESDAY, MAY 9, 2012

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Committee met, pursuant to notice, at 2:30 p.m., Room SD-226, Dirksen Senate Office Building, Hon. Sheldon Whitehouse, presiding.

Present: Senators Lee and Coburn.

OPENING STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator WHITEHOUSE. This hearing will come to order. And I wish everyone good afternoon.

Today we will consider five nominees to the Federal bench. Judge Robert E. Bacharach has been nominated to the U.S. Court of Appeals for the Tenth Circuit.

I welcome each of the nominees and their families and friends to the U.S. Senate and to the Judiciary Committee.

I also would like to welcome my colleagues who are here to introduce their home state nominees.

Voting to confirm an individual to the Federal bench is one of the most important and lasting decisions that a Senator can make. Every day Federal judges make decisions that affect the lives of Americans in all walks of life. In doing so, judges must respect the role of Congress as representatives of the American people, decide cases based on the law and the facts, not prejudge any case, but listen to every party that comes before them, respect precedent, and limit themselves to the issues that the court must decide.

I hope that each judicial nominee we hear from today understands the importance of those core principles.

Judicial nominees also must have the requisite legal skill to serve as a Federal judge. Each of today's nominees has an impressive record of achievement.

As a result, I believe that each nomination deserves prompt consideration. We need good judges in adequate number for our system of justice to function.

In the interest of logistics, let me outline how the hearing will proceed. After the Ranking Member's remarks, home State Senators in attendance will, by almost order of seniority, introduce the nominees. We then will have two panels. The first will be Judge Bacharach, the circuit court nominee, and the second will be the four nominees for district court judgeships.

Senators on the Committee will have 5-minute rounds in which to question each panel.

I would like to have the Senators from the home States speak together. So I am going to jump the junior member to tail their senior member. So it will go Mikulski, Cardin, Inhofe, Coburn, and then Nelson, Rubio, if that is agreeable to everyone.

With that, I turn to my Ranking Member, Senator Mike Lee.

STATEMENT OF HON. MIKE LEE, A U.S. SENATOR FROM THE STATE OF UTAH

Senator LEE. Thank you, Mr. Chairman.

As we begin today, I would like to say just a brief word about

some statements made in recent days by the White House and by some of my Democratic colleagues regarding judicial nominations. There has been some suggestion of record judicial vacancies resulting from unwarranted obstruction in the Senate by means of unprecedented delays and filibusters. Of course, none of this happens to be true.

I would like to set the record straight. The reality is that judicial vacancies are down by 20 percent from last year and, in fact, they are at their lowest level in nearly 3 years.

The vast majority of current vacancies remain for one reason—President Obama simply has not nominated individuals for those judgeships.

With respect to the current 76 judicial vacancies in our Federal judicial system, the Obama Administration has made only 29 nominations.

And I would note that a number of those nominations are so recent that the Judiciary Committee has yet to have even the chance of holding hearings. We are doing so today for five recent nominees.

The Senate has already confirmed more than 80 percent of President Obama's judicial nominees, approving a larger share without a roll call vote than the Senate did under President Bush.

To date, the Senate has confirmed 143 of President Obama's district and circuit court judges. That is significantly more judicial confirmations in the first 3 or so years of the Obama Administration than the 120 that this body confirmed during the previous years of President Bush's second term. And we continue, moreover, to confirm more as we move on.

So far this year, we are well above the historical standards. The average number of confirmations by May 9 for a Presidential election year is 11. We have already confirmed 21 judges this year.

That is almost double the normal pace.

Finally, the suggestion of unprecedented filibusters is simply ridiculous.

During President Bush's first 3 years, Senate Democrats forced 19 cloture votes on judicial nominees, 19 votes to filibuster judges. During President Obama's first 3 years, the Senate took only six such votes.

We have treated President Obama's nominees better than the Democrats treated President Bush's nominees. For the White House or Senate Democrats to suggest otherwise is false and hypocritical.

With that introduction, I welcome today's nominees and their families and look forward to a lively discussion with you today.

Thank you.

Senator WHITEHOUSE. Suffice it to say that there are differing views with regard to the Minority Leader's point of view that, but I do not think this forum is the appropriate venue to continue that discussion.

Senator INHOFE. Thank you, Mr. Chairman, Senator Lee, and Senator Coburn.

I am here actually to introduce two, Judge Robert Bacharach and John Dowdell. It is unusual we get two at the same time, but I am very pleased.

Judge Bacharach has been nominated for the vacancy of the tenth circuit court, which has been traditionally held by an Oklahoman.

I believe that Judge Bacharach would continue the strong

service Oklahomans have provided the tenth circuit.

Throughout his career and education, he has distinguished himself.

In 2007, the Oklahoma City Journal Record profiled Judge Bacharach as an example of leadership in law, where he simply stated that as a future goal, he intends to improve. Always working to improve has defined Judge Bacharach.

He graduated in the top 4 percent of his class, received multiple academic awards, and maintained memberships in the highest orders of law school students.

He began his legal scholarship on law review and has continued writing in a number of law reviews. Judge Bacharach has multiple years of litigation experience, working for Crowe & Dunlevy, a very large firm in Oklahoma City, and in service as a Federal magistrate for the U.S. District Court for the Western District in Oklahoma City.

However, he actually began his legal career with service to the tenth circuit, working as a law clerk for the chief judge of the tenth circuit. As evidence of his career of distinction, when Judge Bacharach was chosen as a magistrate for the western district, among many good candidates, in 1999, the chief judge for the western district characterized the decision to choose Judge Bacharach as an easy one.

Since that time, his colleagues have characterized his service as remarkable, demonstrating superb judicial temperament, and a real asset to the western district court family and their legal community.

So I appreciate the opportunity to introduce him this afternoon.

Senator WHITEHOUSE. Thank you, Senator Inhofe.

With Senator Nelson's kind permission, I will now turn to the junior member of the Oklahoma delegation, Senator Tom Coburn.

Senator COBURN. Mr. Chairman, thank you. I would ask that my written statements be part of the record, and, also, ask that——

Senator WHITEHOUSE. Without objection.

Senator COBURN [continue.] Into the record be placed the recommendations of various and sundry significant individuals from Oklahoma, as well as bar associations, in terms of their commendations in support of this nomination, including that of Judge Lagrange in Oklahoma City.

Senator WHITEHOUSE. Also, without objection.

[The information referred to appears as a submission for the record.]

Senator COBURN. I think our two nominees are a great example of how we have chosen to work with the Administration on getting quality candidates for Federal positions.

I am pleased to support both of these nominations not because of their legal excellence necessarily, not because of what other people have said about them in terms of their legal capability, but what other people have said about their character and their integrity.

And if there is one quality that I believe is most important in terms of capturing the essence of what it means to be American, a free and plentiful access to the rule of law for everybody, that has to come when you have character and integrity in those that are making those decisions.

I have had great conversations with both of these nominees and

I have talked to literally hundreds of people in Oklahoma who sincerely

back and believe in their character and integrity, as well as their unqualified support by the ABA.

So with that, I would tell you that I support their nominations and hope that we can move them through the process.

Senator WHITEHOUSE. Thank you, Senator Coburn.

So I will excuse my colleagues now so that we can reset for our first witness, who will be Judge Bacharach, followed by a panel of the four district court nominees.

Before you are seated, would you raise your right hand?

[Nominee sworn.]

Senator WHITEHOUSE. Thank you, Judge Bacharach. Please be seated. And welcome to the Committee. If you would like to make any form of opening statement or, as is the tradition, introduce friends and family who are here with you, we would be delighted to have you do that now.

STATEMENT OF JUDGE ROBERT E. BACHARACH, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE TENTH CIRCUIT

Judge BACHARACH. Thank you, Mr. Chairman.

First, I would like to express my gratitude to the President of the United States for the great and awesome honor and responsibility from his nomination.

I would also like to thank you, Mr. Chairman, Senator Lee, Dr. Coburn, and each member of this Committee for the opportunity to appear before you today.

I would also like to express my deepest gratitude to Senator Inhofe and Senator Coburn for their fairness in their consideration of my nomination, their great courtesy, and, of course, their support and their very generous remarks this afternoon.

I would also like to briefly introduce my family and friends that are here today, starting with my wonderful wife, Rhonda Bacharach. And at the risk of waking up my 3.5-year-old little girl, I'd like to introduce her, as well. She is a great blessing in our lives. Her name is Olivia Harper Bacharach. She is 3.5. And this is a great moment in our family's life.

I would also like to introduce, briefly, some wonderful friends that are here today, starting with the honorable Ralph Thompson. For some 32 years, Judge Thompson served as a true exemplar of what every Federal judge should strive to be, and I am greatly honored by his presence today.

I also have some other wonderful friends that are present today. Jack Lockridge, Bill LaForge, Bruce Moyer, Lauren Fuller, and Jim Scott, and I am grateful for their great friendship, and, also, for the meaningful gesture that they have taken in appearing as my guests today.

I have a number of friends and family back home that are watching this via Webcast.

And with that, Mr. Chairman, I would be delighted to answer whatever questions you and other members of the Committee might have.

Senator WHITEHOUSE. Thank you, Judge Bacharach.

I just want to let you know that I was the attorney general of Rhode Island for 4 years and I have done some independent research on you through my attorneys general network. I was actually an attorney general while your attorney general, Drew

Edmondson, was the head of the National Association of Attorneys General, and he thinks very highly of you, I want you to know. And so I am delighted to pass on his good wishes and goodwill on this nomination.

In my opening statement, I mentioned a couple of what I think are baseline notions that judges should respect; that judges are obliged to recognize the role of Congress as the elected representatives of the American people; that they are obligated to decide cases based on the law and the facts; that they are obligated to not prejudge any case, but listen fairly to every party who comes before them; that they are obliged to respect precedent; and, that they are obliged to limit themselves to the issues properly presented to the court in the matter that is presently before them.

And I said I hope each judicial nominee will respect and adhere to those principles. And I would like to ask you if you have any disagreement with any of that. That seems pretty baseline stuff, but I think it is worth hearing from you on that.

Judge BACHARACH. Absolutely. Senator Whitehouse, I completely subscribe to the ideal that you identified. A judge's function is not to write the law, not to impose his or her own ideology or philosophy, but simply to abide by the statute, by the Constitution, and I completely agree with the remarks that you made.

Senator WHITEHOUSE. And let me ask you just a quick question about juries. The Constitution and the Bill of Rights recognize the American jury in three separate places. And the great commentator on American democracy, de Tocqueville, in Democracy in America, reflected on the jury as one of the means of the sovereignty of the people.

So it has not only a fact-finding function, but, also, according to de Tocqueville and Blackstone and others, a function in the structure of American government and democracy.

And I wonder if you have any comment on that view of the American jury.

Judge BACHARACH. I agree, Senator. I am always struck when individuals sacrifice their time to serve on juries, how impressed they are with the judicial system, and how they take their responsibilities so seriously.

And it is an indispensable attribute of our judicial system. I completely agree that it is an honor. It is a responsibility that every citizen has, and it is indispensable to our criminal and civil justice system.

It is an attribute that sets our system apart from many other countries and it is very important.

Senator WHITEHOUSE. With that, I will turn to my Ranking Member, Senator Lee, and then I will recognize your home State Senator, Senator Coburn.

Senator LEE. Thank you very much, Judge Bacharach, for joining us today.

You have been appointed to the U.S. Court of Appeals for the Tenth Circuit, a court that I know well and have appeared many times before, and I commend you for that and wish you well in that endeavor, should you be confirmed.

I notice you clerked for Judge Holloway for 2 years, as I recall; is that right?

Judge BACHARACH. Yes.

Senator LEE. My late father, who was also a lawyer, used to say that that is a particularly good deal for the judge if you can get a clerk to stay for 2 years. I assume it was a good deal for Judge Holloway, in your case.

Judge BACHARACH. I hope so.

Senator LEE. I always found him to be very well prepared for oral argument, and I am sure you helped set the stage for that, although I guess we could point out he had been on the bench almost 20 years by the time you got there. Probably one of the longest-serving judges in the Federal judiciary. I think he was put on there in 1968, took senior status in 1992, but still sits.

I think I argued a case in front of him just a few years ago. That is quite a legacy.

Anything in particular that you learned from Judge Holloway that you would take to the bench with you?

Judge BACHARACH. Senator Lee, there are so many things that I learned from my first and greatest mentor, Judge Holloway, but I would mention two. The first are his qualities as a human being. He has an unparalleled humility, modesty, gentility, and respect for every human being.

I think that enables him to take to the bench many personal qualities that do facilitate his ability to adjudicate cases, his ability to listen, his ability to respect the views of his colleagues for whom he may disagree.

Those are qualities that set him apart as a human being, but it also enables him to decide cases in a superior way.

The second quality that I would mention, Senator Lee, is simply his ability to carry out the simple, but indispensable tasks of any good judge; his ability to apply the law to the facts in every case, without regard to his ideology or philosophy or his personal sympathies; his ability to simply apply the law to the facts, albeit simple, is important. It is a defining characteristic of a judge, and he did that in a remarkable way.

And those two qualities are things that I feel very privileged to have witnessed firsthand for those 2 years.

Senator LEE. There is one aspect of your job that will be new, that will be different both from the manner in which you have served as a magistrate judge and that will be one of the few things you did not get to see as a law clerk, and that is the part of your job that would involve sitting on a panel, generally a three-judge panel, except in those rare instances where the tenth circuit is sitting en banc.

How do you approach that as a potential member of this court, the idea of serving with more senior judges? Initially, you will be the most junior member of that court. How will you approach that without surrendering your own individual view of a case?

I assume it is inevitable that there will be times even in your first year on the court where you will disagree with two more senior colleagues. How will you approach that in such a way that will ensure that you do not give in?

Judge BACHARACH. Well, I think one of the important attributes of any good judge, whether it's a senior judge or a young judge, is the ability to listen, the ability to learn.

I am honored by what Senator Inhofe mentioned, my lifelong ideal is to improve, and I plan—if I were so fortunate as to be reported out of this Committee and confirmed by the U.S. Senate—to continue to improve, to continue to listen, to collaborate with other judges, senior or junior to myself. And when I think they are right, I think that it is important for a judge to surrender one's ego and to do what they believe ultimately is correct.

If a judge, after applying the law to the facts, after listening intently and considering the views that may be expressed contrary to one's own expressed views, continues to believe that he or she is correct, it is the responsibility of any judge to abide by his or her oath and to do what they ultimately conclude is the legally correct decision after the application of the law to the facts.

So it is a long-winded way, Senator, of saying I would listen to others, but ultimately I would make my own independent decision, as is my oath.

Senator LEE. Just a quick follow-on, yes or no question. I assume from your answer you would agree with me that the law generally supplies an answer, a right answer to a case. The answer may be difficult to find, but there is a right answer.

It may be one that your colleagues disagree with you on, but there is a right answer.

Judge BACHARACH. That is my view, Senator.

Senator LEE. Thank you.

Senator WHITEHOUSE. Senator Coburn.

Senator COBURN. Thank you. Welcome, again.

Judge BACHARACH. Thank you.

Senator COBURN. Welcome to your family, and congratulations. I have had conversations with you, so my questions are going to be really limited.

In your questionnaire, you noted that you drafted a section on appeals in civil and habeas cases in the tenth circuit court of appeals for a treatise on Oklahoma appellate practice.

You also participated in the *Suiter v. Mitchell Motorcoach Sales and Burkhart v. Restaurants* and *McAllister v. McAllister*, among other cases.

Can you discuss your appellate experience further and how will that experience help you if you are voted out of the Committee and confirmed by the full Senate?

Judge BACHARACH. During my career at Crowe & Dunlevy, for 12.5 years, I had the great fortune to spend a great deal of time both at the State court level and at the Federal court level in participating in a number of appeals.

The cases that you mention are cases in which I conducted the oral argument as lead counsel in the tenth circuit court of appeals. I think there were several cases that you mentioned. In addition, I had a number of opportunities to participate in drafting briefs. Typically, the State appellate courts, the Oklahoma Court of Civil Appeals and the Oklahoma Supreme Court, generally do not entertain oral argument. So in a number of cases, in the State appeals, both at the intermediate appellate level and the State's highest court, I participated by submitting briefs.

I also, of course, submitted a number of briefs in other cases in the tenth circuit court of appeals, in addition to the ones that I

orally argued.

I also, as you mentioned, did the principal drafting for the—I would say a draft that was edited by the two authors of that treatise that you mentioned, Clyde Muchmore and Harvey Ellis, and I don't recall exactly how long it was. I know it was a lot of pages. But I did the work, the principal work for the first draft of that. And that, I think, is a fair summary of my appellate practice, and, of course, in addition, as Senator Lee mentioned, my 2 years under the mentorship of Judge Holloway.

Senator COBURN. In Federalist 45, James Madison wrote, “The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the State governments are numerous and infinite.”

Do you agree with Madison that the powers of the Congress are fundamentally limited?

Judge BACHARACH. Absolutely, Dr. Coburn.

Senator COBURN. What do you see as those limits?

Judge BACHARACH. Well, there are nine sources of legislative power in the Constitution. There is, of course, the first 17 clauses of Article 1, Section A. There are the eight enforcement provisions, the 13th Amendment, Section 2, the 14th Amendment, Section 5, the 15th Amendment, Section 2, the 18th Amendment, the 19th Amendment, the 23rd Amendment, and the 24th Amendment, and, last, the 26th Amendment.

Those are all of the sources of legislative power in the Constitution. The text of the Tenth Amendment reserves the powers that are not enumerated in those—at the time that the Tenth Amendment was drafted, of course, there was only Article 1, Section A. But the text of the Tenth Amendment reserves all powers not enumerated in the Constitution or prohibited to the States—to the States, respectively, or the people. And that is the guidepost that implements essentially what Madison said in Federalist 45.

Of course, Madison was the principal architect of the Tenth Amendment. And in addition to Madison's prescription, of course, Chief Justice Marshall expressed much of the same thing in *Marbury v. Madison*, when he said the powers of the legislature are limited.

So I completely agree with what you express, Doctor.

Senator COBURN. Thank you. One other question, and I ask every judge this question. In your view, is it ever proper for judges to rely on contemporary foreign or international laws or decisions in determining the meaning of the U.S. Constitution?

Judge BACHARACH. Without criticizing other judges, for me, I do not believe that it is appropriate for Bob Bacharach to ever rely on any foreign source to determine the meaning of the Constitution. So in my view, it is unequivocally improper for me to do that.

Senator COBURN. Thank you very much, Mr. Chairman.

Senator WHITEHOUSE. Judge Bacharach, congratulations on your nomination. Mike Lee and I looked at each other as you rattled off without notes the enumerated powers in the Constitution and thought, “You know, that's not bad.”

[Laughter.]

Senator COBURN. I would tell the Committee I did not prep the witness for that question.

[Laughter.]

Senator WHITEHOUSE. Even if he knew that question was coming, that was still a pretty good answer.

So congratulations to you. Thanks to your family for attending.

It is always important to us when family can attend. Your daughter has been both adorable and quiet, a new personal best for me in terms of youthful behavior in this Committee.

And I want to make sure that you do not feel discouraged that there has not been greater attendance at the Judiciary Committee hearing. What you want is uneventfulness, and the perfect set of attendees for you is a chairman, a ranking member, and your home State Senator.

[Laughter.]

Senator WHITEHOUSE. So may your nomination continue to be uneventful, and best wishes as you go forward.

Judge BACHARACH. Thank you, Mr. Chairman.

SUSAN CARNEY
WEDNESDAY, SEPTEMBER 15, 2010
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:02 a.m., Room SD-226, Dirksen Senate Office Building, Hon. Richard J. Durbin presiding. Present: Senators Franken and Sessions.

OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. If I could ask everyone to please be seated. Good afternoon. This hearing of the Judiciary Committee will come to order.

Today, we have before us six outstanding judicial nominees to the Federal bench, and I commend President Obama for sending their names to the Senate. I would like to welcome each of our nominees, as well as their family members and friends who are in attendance.

Our first nominee panel today—excuse me just a second.

Thank you. I am just getting my signals straight here.

First, we are going to welcome members of the House and Senate who are here to introduce those nominees who will be before the Judiciary Committee today. I see Senator Chris Dodd is in attendance.

Senator Chambliss we hope will arrive very shortly. Senator Isakson from Georgia, also, welcome. Representative Eleanor Holmes Norton from the District of Columbia, fresh from her victory yesterday, welcome back. And Congressman Aaron Schock.

So at this point, because of their own schedules, I am going to allow my colleagues to speak. I will tell those in attendance that on the first nominee panel today, we will have Susan Carney, nominated to serve on the U.S. Court of Appeals for the Second Circuit.

Each of the nominees has the support of their home state Senators and in the case of the two District of Columbia nominees, they have the support of D.C. Delegate Eleanor Holmes Norton.

At these nominations hearings, it is traditional for nominees to be introduced to the Committee by members from their home states. The Ranking Member is on his way and will be here shortly, and he has given me permission to go forward with the hearing.

I would note that at 3 p.m., we have a ceremony on the steps of the Capitol in remembrance of the victims of September 11. We may be able to conclude this entire hearing by then; but if not, it is likely that we will take a short recess so that all members will have a chance to participate in that important hearing.

So before I introduce my nominees, I am going to defer to my colleagues who are here. And I believe the most senior in attendance would be the Senator from Connecticut, Senator Chris Dodd.

PRESENTATION OF SUSAN L. CARNEY, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE SECOND CIRCUIT BY HON. CHRISTOPHER DODD, A U.S. SENATOR FROM THE STATE OF CONNECTICUT

Senator DODD. Thank you, Mr. Chairman. That was not always the case, I want you to know, I was senior. But I thank you, Mr. Chairman, very much. And I know the Ranking Member will be along soon, as well.

So I thank you for providing me this opportunity this afternoon to present to you and to the members of the Committee for your consideration the pending judicial nomination for the second circuit. And as you mentioned already, I have the honor of introducing you to Susan Carney, an extremely well respected member of Connecticut's legal community, nominated by the President in May to serve on the court of appeals for the second circuit.

I would also like to take this opportunity to introduce some of her family. I am hesitant, because it is a—I do not know if the whole crowd made it or not, but I went down the potential list and it could fill this room, I think, potentially. But her husband, who is here, Lincoln Caplan; her daughter, Molly, who I met a moment ago, a student at Columbia University.

Her mother, Mrs. Carney, who is a veteran of the United States Navy, and delighted that she made the trip to be with us. Mrs. Carney, thank you and thank you for your service to our country, as well, too, and glad to have you with us today.

Birch Bayh is here, former colleague, member of this Committee, and a great friend of the Carney family, the nominee's family, and was willing to come along and be here with us today, as well.

Birch, it is great to see you as part of this confirmation process.

The Senate's constitutionally mandated duty to provide advice and consent on nominees to the Federal bench is, in my view, one of the body's most important functions. It is our obligation, as members of the U.S. Senate, to carefully examine judicial nominees and determine for ourselves whether they are qualified for the positions that they have been nominated for.

While I realize that my colleagues approach this process with different criteria, I firmly believe that Susan Carney is, by any measure and any criteria, imminently qualified to serve on this most important circuit court.

Since her graduation from Harvard Law School in 1977, Susan has enjoyed a diverse and illustrious legal career that has taken her from government service to private practice to the halls of some of the most prestigious education and research institutions in the world.

Having graduated magna cum laude, Susan clerked for Judge Levin Campbell on the first circuit court of appeals, following a distinguished career in the private sector, where she represented large nonprofit organizations on behalf of a variety of firms in Washington, DC, Los Angeles and Boston.

Susan Carney was hired as the associate general counsel for the Peace Corps in 1996 and after 2 years of performing important legal work for that agency, Susan joined the office of general counsel at Yale University in New Haven, Connecticut.

Since 2001, Susan has served as Yale's deputy general counsel and done so with great distinction, I might add, Mr. Chairman. It is the second highest ranking legal position at the university. In her capacity, Susan has worked on a broad array of legal matters that come before the university, from international affiliations and transactions to research, intellectual property, technology transfer, and compliance issues.

Throughout her career, Susan Carney has developed a professional versatility and breadth of legal knowledge well suited to

serve on the second circuit court of appeals. And perhaps even more important, I believe she has exhibited the kind of temperament and unflinching respect for the rule of law that are absolutely critical components, in my view, of serving on the Federal courts. Last fall, before she was nominated by President Obama, I had the wonderful opportunity to spend time with Susan in my office in Hartford, Connecticut. Among the many topics, including, obviously, the Peace Corps—I served as a volunteer and she served as legal counsel—it came up during that conversation.

We talked about my father's service at the Nuremberg trials in 1945 and 1946 and how the Nuremberg trials are a powerful example of our Nation's commitment to the rule of law. And during that meeting, Susan reiterated her commitment to that ideal. I have no doubt whatsoever that, if confirmed, that commitment to the rule of law will define her service as a Federal judge on the second circuit court of appeals.

So, Chairman Durbin and Senator Sessions, Senator Franken, as well, has joined you on the Committee here, I am certain that during the course of this afternoon's hearing, Susan's excellent qualifications will be closely and fairly scrutinized. It is my hope and confidence that following the Committee's consideration, the full Senate will be able to move forward expeditiously in confirming this superb nominee to serve on this most important circuit court. I thank the Committee.

Senator DURBIN. Thank you, Senator Dodd.

I received a note here, and I would ask the indulgence of the other members. Congressman Schock, I believe, has a roll call vote that ends very shortly and I would like to give him an opportunity to say a few words before he has to depart.

Now, first, we will consider Circuit Court nominee Susan Carney, and she will be brought to the table individually and questions will be asked, and then we will bring the other nominees forward. Before she is seated, it is the custom of the Committee to administer an oath before testimony. So if you would please repeat after me.

[Nominee sworn.]

Senator DURBIN. Thank you. Let the record reflect that the nominee has answered in the affirmative.

So, first, I would like to give you, Ms. Carney, an opportunity to introduce family and friends who may be in attendance.

STATEMENT OF SUSAN L. CARNEY, NOMINEE TO BE UNITED STATES CIRCUIT JUDGE FOR THE SECOND CIRCUIT

Ms. CARNEY. Thank you very much. I'd also like to thank the Chairman, the Ranking Member, yourself, Senator Durbin, Senator Dodd for his generous introduction, Senator Franken, with whom I met this morning, and the rest of the Committee for their time and consideration of my nomination. I would also like to thank Senator Birch Bayh, whose presence here today honors me.

If I could introduce my family members who are here, they could stand up perhaps. My husband, Lincoln Caplan, my husband of 31 years; my daughter, Molly Caplan; my mother, Cleo Carney, a veteran and recently retired from her long-time work; my two aunts, Dr. Maria Olgas, a nurse and professor of medical surgical nursing in Richmond, Virginia; my Aunt Kassie Olgas, long-time operating

room supervisor in the Veterans' Administration, including at Hines Memorial Hospital.

My sister-in-law, Joanna Caplan; her husband, Bob Blaemire, worked for Birch Bayh. My brother, Scott Carney; my mother-in-law, Kit Caplan. And I'd also like to acknowledge my four other brothers who are watching from other venues, my 14 nieces and nephews, my sisters-in-law, and my extended family.

I'm very fortunate in having a large and wonderful family and wonderful colleagues at Yale and elsewhere, as well. So thank you very much.

Senator DURBIN. Thank you.

Ms. CARNEY. One last thing. I did want to mention my father, who died 8 years ago. He was the first lawyer I knew and gave me my first lessons in the law, and he would have been very proud to be here today.

Senator DURBIN. Thank you very much for that recognition. I might also add that we will, without objection, include statements in the record relative to nominees by Senator Joe Lieberman on behalf of Susan Carney, before us now, and a statement also being made by the Chairman of the Committee, Senator Pat Leahy, will be entered, without objection.

[The statements of Senator Lieberman and Chairman Leahy appears as a submission for the record.]

Senator DURBIN. I will ask first and then defer to my Ranking Member here, Senator Sessions.

You have got an interesting background in the clients that you have had, the work that you have done in the legal field, general counsel's office at Yale University, associate general counsel of the Peace Corps. But sticking with the topic which I raised in relation to Judge Shadid, you provided representation for the Major League Baseball Players Association in the unfair labor practices action against the baseball owners during the 1994–1995 baseball strike. To the relief of myself and baseball fans everywhere, the litigation ultimately resulted in the ending of the players' strike. Tell us about your role in that litigation.

Ms. CARNEY. I had worked at the law firm of Bredhoff and Kaiser in those years with George Cohen, who is now the director of the Federal Mediation and Conciliation Service, and Virginia Seitz, in particular, on briefing issues to the National Labor Relations Board about whether a Section 10(j) injunction should issue to prevent the unilateral imposition of the salary cap that the owners were considering at the time.

That effort, the briefing effort, I worked on researching and writing the briefs with my colleagues at Bredhoff and Kaiser. That resulted in an opinion by the National Labor Relations Board in favor of the injunction.

The injunction was subsequently sought and granted by now Justice Sotomayor in New York.

Senator DURBIN. So you have friends in high places. And you also did a lot of work with intellectual property, which is something we discuss at length in the Judiciary Committee. It is a very difficult, complicated issue, but very important, as well. And you did a lot of work on intellectual property law, particularly when you were serving as general counsel at Yale.

How would that experience in this complicated area of law enhance your perspective as a Federal judge?

Ms. CARNEY. I served as acting general counsel for about 6 months and in my—throughout the 12 years I've been at Yale, I've worked on intellectual property issues, including patent law and copyright law.

With all the technological change that we have been experiencing, the law has been changing rapidly in those areas. And there are areas that are subject to consideration by this body that—the Patent Reform Act, for example—that I think the experience I have in licensing, working on licenses for the university, working on issues related to the Digital Millennium Copyright Act, for example, that experience would serve me in good stead, as those issues are presented to the second circuit.

Senator DURBIN. I would like to ask you my last question, a general question, so that it will be part of the record.

Tell us about the pro bono and civic work that you have done even as you pursued your legal career.

Ms. CARNEY. I have focused—not having been a litigator in recent years, but more supervising litigation, although I started as a litigator, I have focused my pro bono work on community service through board memberships, largely, providing guidance and counsel, as I have participated in New Haven youth soccer and so on. I did work extensively on one pro bono matter here in the District of Columbia when I was a resident here, but by appointment of Judge Frank Burgess in the D.C. superior court.

So I have kind of scattered my pro bono efforts in those ways. I think community service is very important and I've always tried to find ways to contribute.

At the moment and last year, I've been serving as a reading tutor. So it hasn't been legal activity, but community involvement in that way.

Senator DURBIN. Thank you very much.

I am going to recognize my colleague, Senator Sessions. And at the beginning of the hearing, I noted that if you had an opening statement, we would be happy to enter it as part of the record at the appropriate place.

Senator SESSIONS. Well, I will do that and would just note that we are moving nominees through the Committee at a rather good rate, and I will definitely be amenable to your request for your judges. They both seem to have good backgrounds. So we will look at that.

But President Obama's nominees to the district court have waited an average of 49 days for a hearing. President Bush's nominees to the district courts have waited 89 days, on average; 28 of those nominees had not received a hearing at this point in the process, and, likewise, we are moving at a pretty fast pace.

So you and the Chairman are keeping us busy. We are keeping up. The President is taking somewhat of his time in making nominations. He should not rush. But of the 85 district court vacancies today, only 33 do we have nominees from. So we cannot confirm people when we do not have a nomination.

But we should take the time to review them carefully because it is a lifetime appointment. It is not an election. It is the confirmation

process and it is the only opportunity the American people have to make sure the nominees are well qualified before they are launched on the public, for good or ill.

Judge Shadid, I see you are a good baseball player. The only thing better would be a good umpire. I think baseball is a good experience for a Federal judge. A neutral umpire would be pretty good, although I noticed some of my colleagues did not like the idea of a neutral umpire in the last confirmation hearings that we have had.

Ms. Carney, you have had about 12 years now as Yale's lawyer and I understand that you have not tried or litigated any cases before the court. Have you ever tried a case yourself as lead counsel or actually been in the trial where you participated in examination of witnesses or arguments before a jury?

Ms. CARNEY. I have been primarily an appellate lawyer, Senator Sessions. I have participated in one hearing in which I examined witnesses and I participated in several depositions, but I have not tried a case to conclusion.

As I said, my focus has been on appellate lawyering.

Senator SESSIONS. Have you argued before the court of appeals a case?

Ms. CARNEY. I have not.

Senator SESSIONS. Nor the Supreme Court.

Ms. CARNEY. No, sir.

Senator SESSIONS. Well, it is a lack. It is not a disqualifying lack. But to me, I think normally we would expect a judge to the United States Court of Appeals, one step below the Supreme Court, to have some experience in the courtroom or in the appellate arena. Do you think that is a handicap to you and do you have any plans as to how you might overcome that?

Ms. CARNEY. Senator, I don't see it as a handicap. I would have preferred to have that experience given where I am at the moment, but I started out as a clerk for an esteemed Federal circuit judge, Levin H. Campbell, worked on many opinions with him, for him. Of course, the result was his.

I worked on appellate briefs, including Supreme Court briefs, extensively in the first chapter of my career when I was a lawyer here in Washington. I have continued to be involved in litigation since then, more as a supervisor or a co-counsel, on activities for the Peace Corps and for Yale.

And I believe that the breadth of experience that I have as a government lawyer, in private practice, and now as an in-house counsel for a major research university gives me broad exposure to the legal issues that are likely to come before the court of appeals. And so I do feel that I'm qualified for this position.

Senator SESSIONS. I would just say I do believe you learn something from actual participation before a judge. If you want to be a judge, you normally like to have seen one in action. And I do think that we should—that is a factor that weighs in my evaluation of a nominee.

I will not attempt to express the things that you can learn from that actual experience, but one of the things is that a lawyer who has practiced a lot or a judge who has been on the bench for a while, I think, understands that they are not policy-setting officials.

They have to decide the discreet dispute before them and that is what the parties expect and when they get away from that, they are damaging the system and they are not as effective as they should be.

You have had very little criminal experience. Are you familiar with the sentencing guidelines and describe your understanding of the sentencing guidelines, the importance that they play in the criminal judge system and Federal court, and the degree to which you feel guidelines should be followed.

Ms. CARNEY. I am familiar with the sentencing guidelines. I believe that they brought an important consistency to Federal sentencing throughout the United States after years of great inconsistency. I'm familiar with the Booker decision that held that they were—these guidelines were no longer mandatory, but were advisory, and I believe the second circuit has extensive case law with regard to the guidelines and requires its district court judges to apply and calculate the sentences and the sentencing range that would be applicable were the guidelines still mandatory and that the practice is of deferring and giving weight to the guidelines in sentencing.

Senator SESSIONS. Have you formed an opinion about your personal view as to the respect the guidelines should be given?

Ms. CARNEY. Well, if I were so fortunate as to be confirmed, Senator Sessions, I would follow the Supreme Court law and the court of appeals law in the second circuit about implementing the guidelines in the post-Booker environment.

Senator SESSIONS. Well, I agree with you that they are valuable, too. There is no doubt it has reduced the disparity in sentencing and you have to know, which perhaps you have not had the experience to know, but judges in the very same courthouse, often on the same floor, were giving dramatically different sentences for the very same offenses. And it is like which judge you knew depended on whether you got probation or 10 years in jail, and that is what this Committee, before I got on it, from Senator Kennedy to Senator Thurman and Senator Biden and others agreed was an untenable position.

So we moved to the guidelines, but there is an erosion of their power by recent Supreme Court decisions. And I hope that as you wrestle with those issues that come before you, you will understand that there is a danger in deferring too readily to unsupported views of a trial judge who just may not be willing to—does not want to be consistent.

Tell me about your view on the death penalty. Have you expressed any views on that and do you have an opinion as to its appropriateness?

Ms. CARNEY. If I were to be confirmed, Senator Sessions, I would apply the law as it—as I read the law, the law of the second circuit and of the Supreme Court, and I feel comfortable doing that.

Senator SESSIONS. Have you expressed an opinion on the death penalty as to whether or not you think it is an appropriate sentence and if the legislature should or should not pass it?

Ms. CARNEY. I have not.

Senator SESSIONS. And you are prepared to enforce it, regardless of your personal views, in a fair and effective way.

Ms. CARNEY. Yes, Senator, I am.

Senator SESSIONS. We have had a good bit of discussion about a

judge allowing empathy or their feelings for how the law affects the daily lives of American people in their decisionmaking process.

Do you believe a judge should allow their own personal, political, moral, religious or social values to influence their decisionmaking process?

Ms. CARNEY. Senator, I believe the job of a judge is to objectively apply the—and neutrally apply the law to the fact as found before him or her, as presented.

Senator SESSIONS. I know Justice Sotomayor rejected President Obama's empathy standard, as it came to be known, saying, quote, "We apply the law to the facts. We don't apply feelings to facts," closed quote.

Do you agree with that comment?

Ms. CARNEY. Yes, Senator.

Senator SESSIONS. Well, thank you for these comments. I will be submitting, I am sure, some additional questions for the record.

I will note, for all of the nominees and for the people in the audience, that you have to go through a pretty rigorous examination before you get to this chair. You have to meet with Department of

Justice, you meet with the White House lawyers, you are reviewed

by the ABA, the FBI does a background check, all of which is available to us and we evaluate in our analysis of the nominees.

So I would just say that we feel a responsibility, all of us do, I think, on the Committee to make sure that we fulfill that duty carefully before we cast our vote.

Thank you very much.

Ms. CARNEY. Thank you, Senator.

Senator DURBIN. Thank you, Senator Sessions.

Senator Franken.

Senator FRANKEN. Ms. Carney, as Senator Sessions mentioned and as you acknowledged, you have never tried a case to verdict. But as you replied, you have had a pretty substantial appellate practice.

How many Federal appeals have you worked on?

Ms. CARNEY. Senator Franken, I'm not exactly sure. I haven't done the count. I've worked on some appeals at Yale. I have worked on appeals when I was in practice in Washington. Maybe it's 15 cases. I couldn't say.

Some of those—that includes a Supreme Court case, which involves a petition for certiorari and so on.

Senator FRANKEN. But this is an appeals court and you have had somewhere in the ballpark of 15 appeals.

Ms. CARNEY. I couldn't say for sure, but I think that would be—that doesn't include the experience I had when I was clerking for Judge Campbell and the other brief-writing that I participated in, which is a similar exercise.

Senator FRANKEN. How many Federal appellate briefs have you written?

Ms. CARNEY. I, again, would think it's around 15, but that's appellate brief. Similar would be motions for summary judgment, motions to dismiss, arguing legal standard and analyzing cases in the motions practice, which more characterizes the litigator's practice this day than a trial practice, which my father engaged in.

Senator FRANKEN. And this is an appellate court, obviously, that

you——

Ms. CARNEY. Yes, Senator.

Senator FRANKEN (Continuing). Have been nominated for. So that experience is very relevant, I would think.

Ms. CARNEY. Yes, Senator.

Senator FRANKEN. Now, Senator Sessions was talking about the job of a circuit judge is to apply the law, and I would think that could well be described—since you are abiding by decisions that are made by the Supreme Court, that the appellate judge really is an umpire, more or less.

Ms. CARNEY. Well, I think that the job is——

Senator FRANKEN (Continuing). Maybe more so than a Supreme Court justice.

Ms. CARNEY. I think that the job is to apply the law to a record that's established in the district court and because the facts are found below and the Supreme Court is directive above and one is surrounded by precedent, there are fairly narrow margins for——

Senator FRANKEN. Interpretation.

Ms. CARNEY (Continuing). Interpretation, exactly.

Senator FRANKEN. Right. So that, in a way, really is—it is narrow because it has really been defined by decisions that you adhere to. You are always going to be applying the decisions that have been made by the court, by the Supreme Court and by the appellate court, before you, right?

Ms. CARNEY. Yes, Senator.

Senator FRANKEN. So in that way, very much like an umpire, and I think that Senator Sessions can take great solace in that. On the Supreme Court, then, you do not have to answer this, but it seems to me that you are almost defining the strike zone and it is almost an entirely different job. I would not expect you to want to even get into that.

But an important part of your work, if you are confirmed, is to interpret our work in the Congress. When you are interpreting a statute, what will you do to make sure that you are interpreting the law in line with our intent?

Ms. CARNEY. I would start with the text of the statute. I would look to other judicial interpretations of the statute, starting with the Supreme Court, of course, and within the second circuit, as well as collegial circuits and, from the text and the interpretations that had already occurred, work to understand the Congressional intent and to apply it as Congress intended.

Senator FRANKEN. Well, let me ask one last one. In the 1990's, mid 1990's, you represented a workers' union in Tennessee, after its members were exposed to depleted uranium, and I think you had an important victory there.

Can you tell us about that case?

Ms. CARNEY. That was a case in which workers had walked off the job because of a fear of imminent harm from their exposure to depleted uranium. They invoked a clause of the National Labor Relations Act, as I recall, that gave them the permission, if you will, under the statute to absent themselves in a non-strike situation. And there was a debate between the union and the employer about whether that clause applied or whether there was really something else going on. The firm I was with, Bredhoff and Kaiser.

After a very long history in the courts and before the National Labor Relations Board, the workers' position was vindicated that this was a potential harm to them and that they were justified in invoking this section of the statute that Congress had passed.

Senator FRANKEN. Thank you, Ms. Carney, and congratulations on your nomination.

Ms. CARNEY. Thank you so much.

Senator DURBIN. Ms. Carney, thank you very much. And since there are no further questions for you at this time, we are going to excuse you. You probably will receive written questions from members who are here today and those who will look over the transcript of the record and your background before reaching their conclusions about your nomination.

But thank you very much for being here, we really appreciate that, and for your family and friends for attending with you.

Senator Bayh, it is always good to see you and I think that Ms. Carney has at least one Senator she might recommend that you speak to on her behalf.

ROBERT CHATIGNY
WEDNESDAY, APRIL 28, 2010
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:35 p.m., Room SD-226, Dirksen Senate Office Building, Hon. Amy Klobuchar presiding.
Present: Senators Sessions, Grassley, Kyl, and Coburn.

OPENING STATEMENT OF HON. AMY KLOBUCHAR A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator KLOBUCHAR. All right. I'm pleased to call this nominations hearing of the Senate Judiciary Committee to order.

I want to give a warm welcome to both of our nominees. I can tell you, the last nomination hearing that I chaired—I think Senator Sessions was there—was in the middle of the snow blizzard and our nominees were stranded in a hotel room with their babies for 6 days, so they were really happy to come out and be here. So, it is great to be here with our judicial nominees, Robert Chatigny, as well as the second one, who is Mr. Gibney. So, thank you very much, both of you, for being here. We have many Senators, seven Senators, here for this great event. So we'll start here with Senator Dodd, who was here first. I know that he is going to speak and introduce Robert Chatigny, as is Senator Lieberman. Senator Dodd.

PRESENTATION OF ROBERT N. CHATIGNY, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE SECOND CIRCUIT BY HON. CHRISTOPHER J. DODD, A U.S. SENATOR FROM THE STATE OF CONNECTICUT

Senator DODD. Thank you very much, Madam Chairman, Senator Sessions, Senator Grassley. Of course, I am delighted to be talking about anything but financial reform at this point.

[Laughter.]

Senator DODD. So I may stay here and filibuster the rest of the afternoon on this matter so I don't have to go back to these other issues. But I'm delighted to be here this afternoon and to introduce, along with obviously Joe, my great pal and friend here, an individual that I not only respect immensely, but is my great, great friend for many, many years, and his family as well.

He's here, Madam Chairman, with his wife Stacy in the back. He'll want to introduce these people himself, probably. Stacy and two sons, John and Peter, who are here, and sister-in-law Sugar, his mother-in-law Elaine is back there as well, sister-in-law Barb, brother Vic, are all the family kind of gathered around as well. So we're delighted to recommend or to introduce them as well, so I thank you for having this hearing.

Judge Chatigny's outstanding resume, Madam Chairman, I think makes it clear that he's tremendously well-qualified to serve on the Second Circuit of the Court of Appeals. I want to congratulate President Obama for this excellent nomination.

In 1994, President Clinton nominated Judge Chatigny, Bob, to serve on the District Court and Judge Chatigny was confirmed unanimously by the U.S. Senate in 1994. For nearly 16 years he has been a Federal judge in Connecticut, serving as chief judge for

the District of Connecticut from 2003 to 2009. In addition to ruling on a wide variety of cases, Judge Chatigny has earned a reputation of integrity, intelligence, and strict adherence to the rule of law. So I am pleased that Judge Chatigny has received the support of numerous former Federal prosecutors in Connecticut who understand the importance of upholding the rule of law and vouch for his character and his qualifications.

Allow me to quote from a letter that I think was sent to the Committee, Madam Chairman, from three former U.S. Attorneys, each of whom happened to be appointed by Republican Presidents at the time who served well and with great distinction in our State. In their letter to you and to the members of the Committee, they said this about Judge Bob Chatigny: “We believe that he is a fair-minded and impartial judge who has the appropriate fitness and temperament for the appellate court.”

In addition, Madam Chairman, the Committee has also received a letter signed by nearly 20 Assistant U.S. Attorneys currently practicing in Connecticut in which they express their confidence as well that Judge Bob Chatigny would be “unbiased, compassionate, and temperate”. Clearly, Madam Chairman, Bob has the confidence and the support of the Connecticut legal and law enforcement communities in our State.

Judge Chatigny’s legal experience prior to his appointment reveals a very rich understanding of, and a very deep, deep commitment to, the American legal system. After graduating from Brown University and Georgetown University Law Center, he served as clerk to three Federal judges, including Judges John Newman and Jose Cabranas. Prior to his service on the court, Bob built an excellent reputation in private practice, first as an associate at Williams & Connolly here in Washington, then returning to private practice in Hartford, Connecticut for a decade.

In addition, Judge Chatigny has devoted substantial time and effort to improving the legal profession. When the Governor of Connecticut sought experienced and knowledgeable public servants to help make up better public policy, Judge Chatigny was the easy choice, serving on both the State Judicial Selection Commission and the State Commission on Prison and Jail Overcrowding.

In addition, he has served various roles with the Connecticut Bar Association, as well as being an advisor to the congressionally created Federal Court’s Study Committee. There can be very little doubt—no doubt whatsoever then—that this man’s talents, his temperament are tremendous well-suited for service on the Second Circuit Court of Appeals.

On a personal note, Madam Chairman, I have had the privilege of getting to know Bob for many, many years. His wife Stacy and her parents I knew even before I knew Bob and we go back a long time. They’re very, very close, wonderful friends of my parents as well. As a friend of Bob’s and someone who recognizes his tremendous accomplishments, I am grateful that he has agreed to continue his service to our country by allowing his name to be put forward for this very, very important position. As a Senator, I am proud to recommend to you one of the State’s finest jurists, Bob Chatigny, as the next member of the U.S. Court of Appeals for the Second Circuit.

I would say on a side note, not part of these remarks, in terms of a full disclosure, that 11 years ago this June, Bob also married me and my wife Jackie. Jackie is not here to testify, I believe, on his behalf after 11 years, but I believe she would as well. So I know that's not part of the remarks and no reason for his name to be forward for you to consider voting for him, but I would be remiss if I didn't thank him publicly as well for performing those duties on that day.

Senator SESSIONS. Well, that was a good act.

Senator DODD. Yes, it was.

[Laughter.]

Senator DODD. He was impartial, too. Showed good temperament, Jeff.

Senator KLOBUCHAR. And thank you, Senator Dodd, for revealing that conflict of interest.

Senator DODD. That is a conflict.

[Laughter.]

Senator KLOBUCHAR. That was very, very smart.

Judge, I see you also have half of the independent caucus of the U.S. Senate here in your other Connecticut Senator.

Senator Lieberman, welcome.

PRESENTATION OF ROBERT N. CHATIGNY, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE SECOND CIRCUIT BY HON. JOSEPH LIEBERMAN, A U.S. SENATOR FROM THE STATE OF CONNECTICUT

Senator LIEBERMAN. Thanks, Madam Chair, Senator Sessions, members of the Committee. I thank you for giving me this opportunity to join my dear colleague and friend, Senator Dodd, in support of Judge Robert Chatigny's nomination to serve on the U.S. Court of Appeals for the Second Circuit.

I am proud to be here to support the nomination. I'm delighted to see his family. I want to mention, his late father-in-law, Peter Savin, who was a great friend to Senator Dodd and me, a wonderful citizen in Connecticut, very charitable, just a lot of fun to be with, passed away some years ago so he's not here in person. But I actually felt that he called me when I was in a conference committee a while ago and said, now, get up and get over to give your statement for Bob. That's important.

Senator Dodd and I, together, recommended Judge Chatigny to President Clinton in 1994 for a vacancy that then existed on the District Court in Connecticut, and he was, I am happy to say, nominated and confirmed by the Senate unanimously. In fact, from 2003 to 2009, Judge Chatigny was the chief judge for the District of Connecticut.

Throughout his tenure on the court he has demonstrated a surpassing commitment to thoughtful, hardworking rulings upholding the rule of law. He's shown real impressive legal knowledge and capabilities. I hear from both those who have appeared before him, but also from his colleagues, that he has that magical, mysterious ingredient known as a fine judicial temperament and has worked very effectively with his colleagues on the bench to fashion opinions, to keep the court moving in exactly the direction it should be moving.

I'm not going to repeat all the facts of his personal and legal career

which Senator Dodd did, except to say that I think that in his years on the District bench he has clearly earned the respect of his peers on the bench and in the Connecticut bar. He's rendered admirable service for the past 15 years as a district judge, which makes him eminently capable to sit on this very important Circuit Court. It is why I am so grateful that President Obama responded favorably to our recommendation and that of many others that he give Bob Chatigny the chance to serve on the Second Circuit Court, and why I feel that he is so clearly ready to assume this responsibility. So I thank you and the members of the Committee for proceeding forward with the confirmation process here and I look forward to working with you and the rest of our Senate colleagues to see to it that Judge Chatigny is confirmed to serve on the Second Circuit Court of Appeals.

Thank you very much.

Senator KLOBUCHAR. Well, thank you very much, Senators Dodd and Lieberman. Of course you are welcome to stay to hear your colleagues, but if you have other things to do, we understand that as well and we really thank you for coming to our Committee today.

Thank you.

Senator WEBB. First of all, I have to say that when I found out that Judge Chatigny was an alumnus of Georgetown Law Center the same era that I was, it brought back a saying that they used to have at Georgetown. That was that the A students became professors and judges, the B students practiced law, the C students went into business, and the D students became politicians.

[Laughter.]

Senator WEBB. So here we both are, Judge.

Senator Sessions is going to give his opening statement. Before I do that, I wanted to put the opening statement of Chairman Leahy on the record in support of both of our nominees, Judge Chatigny as well as Mr. Gibney.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

Senator KLOBUCHAR. Senator Sessions.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Madam Chairman. I look forward to the hearing today. The nominees have all been looked at through our staff and through the President and his staff, and undergone background evaluations by the FBI, and the American Bar Association, and anyone else who wants to comment on their nomination.

So even though the hearings are important, also much of this is in the record and we have the ability to review it.

Looking at the nomination of Judge Chatigny, I think we'll ask a number of questions today about that. He presided over several last-minute motions to stay the execution of perhaps Connecticut's most notorious serial killer, Michael Ross, who had been convicted and sentenced to death nearly 20 years earlier for kidnapping, rape, and murder of six women, and he confessed to the murder of eight.

After multiple appeals, State court proceedings, and in Federal court, the defendant explicitly instructed his attorney not to appeal anymore. From there, we had a number of actions by the judge to

really frustrate what appeared to be the lawful decision of the State of Connecticut, and I have concerns about it. We've talked earlier, and I appreciate that.

Judge, I enjoyed our opportunity to meet. I'm not in any way questioning your integrity and intentions. I appreciate the strong support that Senator Dodd has given to your nomination. I also got a call from former Attorney General Mukasey, who believes in you and supports your confirmation.

But seven Assistant State's Attorneys General have filed an ethics complaint concerning the conduct in that case, and we have a letter from the attorney, the prosecutor who handled the habeas case in your court who opposes your nomination. So it is a matter that I take very seriously and I believe judges have roles. Federal judges, in review of State court convictions that have been confirmed by the State Supreme Court, have limited responsibilities to interfere in the execution of that and we'll discuss those issues as we go forward. Thank you.

Senator KLOBUCHAR. All right. I'm going to ask the first questions, then we'll go down the row here. I think I'll start with a general question about how you would characterize your own judicial philosophy and what makes you want to be a judge.

Judge CHATIGNY. I appreciate the Committee's interest in learning how I approach cases and I do my best to decide each case on its merits, taking each case one at a time, examining the facts with care, applying the relevant precedent, and avoiding injecting my own personal policy preferences into the matter.

I've tried to do that throughout my 15 years as a district judge, and if I am fortunate enough to be confirmed, I would do that as a judge of the Court of Appeals.

Senator KLOBUCHAR. Senator Dodd and Senator Lieberman mentioned your family, but there may be relatives they didn't mention.

So if you want to introduce them to us, we'd love to meet them.

Judge CHATIGNY. Actually, Senator Dodd, as usual, was very good to introduce everybody, I believe. My wife Stacy is with us, my sons Peter and John are seated here in the front row, and my good friend Peter Kahn from the law firm of Williams & Connolly. Behind them, my brother Vic and his wife Barb, and my mother-in-law, Elaine Savin, and my sister-in-law Sugar. We appreciate very much this opportunity to appear before the Committee today.

Senator KLOBUCHAR. Well, thank you.

You talked about your judicial philosophy. I appreciated that answer. Has your being a judge for the last 16 years changed at all your view of what a judge does?

Judge CHATIGNY. It has impressed me with the importance of treating each case with care, extending to all people who come before the court an opportunity to be fully heard and it has left me with a strong conviction about the importance of the facts of each case and the need to examine the facts of each case with particular care.

Senator KLOBUCHAR. Thank you. I'd like to explore that more, but I was listening to Senator Sessions' opening statement and I know he wants to focus on one of your cases. I thought I would give you an opportunity, just right here, to talk about that. I know this is the Michael Ross case involving horrific murder. I guess my first

question as a threshold matter would be: do you have any problems applying the death penalty or upholding capital sentences?

Judge CHATIGNY. None at all.

Senator KLOBUCHAR. And the death penalty is, of course, the ultimate punishment. We have to be very careful when it's applied.

For example, individuals have to be competent to stand trial. According to a 2002 Supreme Court ruling—that would be *Atkins v.*

Virginia—executing mentally incompetent individuals is a violation of the Eighth Amendment ban on cruel and unusual punishment.

And so I know from cases that I read throughout my life and work as a prosecutor, whether it's a death penalty or a non-death penalty case, that judges are very conscious that these procedures be followed with any case. Is that correct?

Judge CHATIGNY. Yes.

Senator KLOBUCHAR. And in this case, Michael Ross, the defendant, indicated that he wanted to waive further appeals and be put to death. So when you hear that and you know about the murder, if you're a guy on the street you think, OK, it's over. Could you explain to me what made you question whether he was legally competent to waive his appeal and just make that decision on his own?

Judge CHATIGNY. Yes. Thank you for the question. I understand and appreciate why people are concerned about what happened in this difficult case. The litigation came before me on a Friday afternoon and I was asked to conduct an emergency hearing on the question whether this defendant was competent to waive legal challenges to the death sentence.

I had no reason to question the good faith of the people who came before me. They did not appear to be death penalty abolitionists, interested in using the court to pursue their own agenda. I thought that they were urgently concerned about the question of his competence.

I looked at the case over the weekend and presided at an emergency hearing on Monday. Based on my review of the facts and the law, I concluded that a stay should enter so that a hearing could be conducted on the issue of his competence to waive challenges to his death sentence. It was a very difficult week for all concerned.

The Court of Appeals upheld the stay, but a closely divided Supreme Court vacated the stay.

Senator KLOBUCHAR. And there was a 6-day evidentiary hearing, is that right?

Judge CHATIGNY. As a result of the events that occurred during that week, the defendant's own counsel moved in the State court for a stay so that a full hearing could be held on the issue. A hearing was conducted. A determination was made that the defendant was competent, and he was executed.

Senator KLOBUCHAR. And do you have any issues with the Superior Court's determination?

Judge CHATIGNY. No.

Senator KLOBUCHAR. So I just want to be clear before we embark on this journey to talk to you more about this case, that the whole episode here wasn't about the death penalty. You were ready to actually give that out as a sentence. The issue to you was whether or not the defendant was competent to make certain decisions.

Judge CHATIGNY. That's correct.

Senator KLOBUCHAR. And after this Ross episode was over, there were complaints filed against you alleging judicial misconduct for how you handled the case. A special Committee comprised of then-Second Circuit Chief Judge John Walker, Second Circuit Judge Pierre LaValle, and then-Chief District Judge Michael Mukasey of the Southern District of New York exhaustively investigated the facts and the allegations against you, and this panel absolved you of any wrongdoing and cleared you of all the allegations against you. Is that correct?

Judge CHATIGNY. Yes.

Senator KLOBUCHAR. And then the findings of this special panel were adopted by the Judicial Council for the Second Circuit. Is that right?

Judge CHATIGNY. Yes.

Senator KLOBUCHAR. All right. Very well. I have gone slightly over my time, so Senator Sessions, if you want an extra minute and a half, please, it's yours.

Senator SESSIONS. Thank you.

Senator KLOBUCHAR. Thank you.

Senator SESSIONS. But I see my colleague is here. Senator Grassley is here, Senators Coburn and Kyl. I'd be pleased to yield to Senator Coburn at this time.

Senator COBURN. Welcome, Judge Chatigny. I want to go directly to the Ross case, but before I ask you questions I want to make sure that everybody understands that are not familiar with the case of the Roadside Strangler, Michael Ross. I'd like to describe a few of the details before I ask you questions.

While in prison, Michael Ross participated in the creation of a documentary on serial killers entitled, "The Serial Killers," during which he described in great detail how he raped and murdered eight women and girls. In the video, he explained, "Serial killers like me like to strangle their victims, and that is I guess the most common form of killing because there's more of a connection, it's more real, it's not as quick." Ross murdered all of his victims by strangling them.

He later describes how he tied up Leslie Shelly, age 14, and put her in the trunk of his car and then took the other girl, April Brunias, age 14, and "raped her and killed her, and I put her in the front seat." Then he pulled Leslie Shelley out of the trunk and brutally raped and killed her. In describing his last victim, Wendy Baribeault, he said, "I raped her and I killed her. It wasn't as pleasant. It wasn't a nice rape."

Judge Chatigny, this is the man you described in your testimony and in your discussions on this case as "the least culpable of people on death row" and said, "he should never have been convicted, or if convicted, he never should have been sentenced to death," and that "when Mr. Ross says that I feel I'm the victim of a miscarriage of justice because they didn't treat it as a mitigating factor, I can well understand where he's coming from."

Judge, this serial murderer is the man you did everything possible to prevent the execution of. I think the record shows that. You believed in your position. I just wonder why you think your behavior in this case, which is pretty extraordinary—I've only sat on this Committee for 5 years—why that behavior would warrant a promotion

to a much more senior court.

Judge CHATIGNY. Senator, thank you for your question. I appreciate your concern. And of course, I found these horrible crimes to be unimaginably and unspeakably abhorrent. I believed that under the law, I was obliged to give careful consideration to the claim that he was not competent to waive legal challenges to this death sentence.

Senator COBURN. Was he not found out to be competent and ruled competent?

Judge CHATIGNY. Ultimately, yes. After a full adversarial hearing he was determined to be competent, and on that basis he was executed. I believe that the law required such a hearing to be held and that was my sole concern. I regret very much using words that make it appear that I was concerned about the issue of his guilt. In fact, I had no such concern.

Senator COBURN. But you did, in fact, agree that there were mitigating circumstances. I think you pronounced him with a diagnosis of sexual sadism. Is that correct?

Judge CHATIGNY. Senator, I wish I could——

Senator COBURN. I have the record here. Those are your words.

Judge CHATIGNY. Yes. And read out of context, I can appreciate that the reader could think that I had an opinion. I addressed those issues in connection with the issue of competence. The defendant had a long history of mental illness, several disorders, including the one you mentioned. These were relevant to the question of his competence to waive legal rights.

Senator COBURN. What was the name of the psychiatrist who diagnosed him with sexual sadism?

Judge CHATIGNY. He was evaluated by a psychiatrist named Michael Norko, and Dr. Norko testified in the State proceeding that preceded my involvement that the defendant was competent. Part of the difficulty in this unusual case was that there was no adversary proceeding at that stage and his opinion was not tested in any way. After the events that occurred before me, he contacted the defendant's lawyer and said, now that I have looked at material I had not seen before, I realize my opinion could change. And it was on that——

Senator COBURN. Could change or did change?

Judge CHATIGNY. Could change.

Senator COBURN. OK.

Judge CHATIGNY. And on that basis, the defendant's lawyer sought a stay so that the issue could be adequately investigated and reliability determined.

Again, I apologize for using words that call into question my character as a judge in that case. In life, we——

Senator COBURN. I'm not challenging your character. Your record shows that you have great character. That's not what I'm challenging.

I'm worried about a standard that's outside the law, an empathy standard where you become too identified with a case to make a sound judgment. As a matter of fact, multiple courts before yours had found him competent. You were not the only one.

The other question that I have is that you were actually involved in this case prior to it coming to you as an attorney, is that correct?

Judge CHATIGNY. Technically, perhaps. But——

Senator COBURN. Was that made evident to the people who were on both sides of the trial in this case? Was it disclosed?

Judge CHATIGNY. It was not, for the simple reason that I had forgotten my prior involvement.

Senator COBURN. In a serial murder case of eight people?

Judge CHATIGNY. I was not involved in the case. Thirteen years before the matter came to me I was contacted by a friend who asked me if I would file, on behalf of the Connecticut Criminal Defense Lawyers Association, a motion in the State Supreme Court for leave to file an amicus brief on an evidentiary issue. I agreed to do so. I reviewed the motion that he prepared and I saw to it that it was filed, and that was the end of my involvement in the matter.

Senator COBURN. I think my records are correct, that's the only death penalty case you were involved in in 25 and you forgot it?

Judge CHATIGNY. Senator, the simple truth is that—

Senator COBURN. The rape and murder of eight young women?

Judge CHATIGNY. Well, I never represented Michael Ross and my involvement didn't extend beyond essentially acting as local counsel for my friend for the purpose of filing an application to file a motion, and that—

Senator COBURN. But you actually did research on that case on mitigating factors. Is that correct?

Judge CHATIGNY. I did some very limited research before concluding that there was no need for me to be involved anymore, and I told my friend that this was the case and I had no further involvement.

Senator COBURN. I'm sorry. My time is up. I'll have to wait till the second round.

Senator KLOBUCHAR. Thank you very much.

Just to clarify the record, Judge Chatigny, the issue last raised by Senator Coburn about your recollection of filing a motion, you didn't actually represent the defendant, is that correct?

Judge CHATIGNY. That's correct.

Senator KLOBUCHAR. And in the Mukasey report when they reviewed the conduct from this case, they in fact found that this was innocent and not misconduct. Is that correct?

Judge CHATIGNY. They found that it was an innocent lapse of memory, which it was.

Senator KLOBUCHAR. OK.

Judge CHATIGNY. When I realized that I had a prior involvement I was stunned, as was my former partner when he learned about it. It had been 13 years. It may seem to reasonable people that my involvement was in some way significant, but it wasn't.

Senator COBURN. Madam Chairman, I'd just like to add, prior to you joining our Committee there was a judge, a Circuit judge by the name of Jim Payne who disclosed he owned 100 shares of Wal-Mart to the litigants in a trial and we castigated him as a Committee. I didn't, but the Chairman did, saying how unethical it was, even though he disclosed it. So we're talking about two different standards now, one that says it's fine not to disclose and one that says somebody is not on the appellate bench today because they did disclose. I'd add that to the record.

Senator KLOBUCHAR. OK. Well, I wasn't there for that case. I just know what the finding of Judge Mukasey was in this case, and

that was that there was no misconduct.

Senator COBURN. But our job is not on the findings of Judge Mukasey. It is our job to see if somebody is suitable for a Circuit judge position, not the finding of an appeal in terms of lawyers.

Senator KLOBUCHAR. That's correct.

Senator Sessions.

Senator SESSIONS. Senator Kyl, I'll yield.

Senator KYL. Thank you very much, Judge. Welcome. Maybe that's not the right terminology here, but obviously this Ross case is something that's been well-publicized. It's something that I'm sure you appreciate we have an obligation to look into.

Judge CHATIGNY. Yes.

Senator KYL. Part of the concern that I have about the case relates to the issue of judicial temperament. You consider judicial temperament to be a key factor in our evaluation of a nominee for the court, I presume. I guess the thrust of the questions that I have go to a conference you held with some of the lawyers and some of the terminology that you used during that conference. This was on January 28, according to the notes that I have here, with the defendant's lawyer, whose name is Paulding.

Here are some of the things that my notes reflect that you said during that. First of all, do you remember that teleconference?

Judge CHATIGNY. Yes.

Senator KYL. At least now you do.

Judge CHATIGNY. I do.

Senator KYL. You told him that he was "facilitating the execution of his client", that "we are not in this profession to help people get killed", and third, "and I tell you that, Mr. Paulding, because it is true. What you're doing is terribly, terribly wrong, and so I don't know how anybody in your position honestly, Mr. Paulding—I do not know how anybody in your position could be accepting of this responsibility to proceed in the face of this record to be the proximate cause of this man's death."

Do you remember those statements?

Judge CHATIGNY. I do.

Senator KYL. You then went on to warn him of the consequences of his not reversing course. You said, "So I warn you, Mr. Paulding, between now and whatever happens Sunday night, you'd better be prepared to live with yourself for the rest of your life and you'd better be prepared to deal with me if an investigation is conducted and it turns out that what Lopez says and what this former program director says is true, because I'll have your law license." Do you remember saying that?

Judge CHATIGNY. Yes.

Senator KYL. And then when Mr. Paulding told you that he had spoken to his client as you had previously instructed him to do, you responded, "Then you better make a clear record of it. You better have a court reporter there taking down the advice you're giving him, because believe me, if—you're going to need it. You're going to need it."

Do you remember saying that?

Judge CHATIGNY. I do.

Senator KYL. Do you think that the way that you expressed yourself in that hearing was appropriate and do you believe that it

might raise a legitimate question in our mind as to your judicial temperament?

Judge CHATIGNY. Senator, thank you for asking me this question because I can well understand why you would be concerned. I regard judicial temperament as vitally important, indispensable. And one of the difficulties that I have with the Ross case is the way I spoke to Mr. Paulding. I used words that were excessive, words that were harsh. I regretted them immediately and I undertook to apologize to him at the earliest opportunity and he was very gracious to say to me that no apology was necessary. But, yes, I do acknowledge that my choice of words was terrible. It's a situation in which I believed then, and I believe now, that I did the right thing, but I went about it the wrong way.

Senator KYL. Do you recall now what caused that to occur? Did you lose your temper? Were you simply really uptight about this particular case? Were you mad at Ross? What was your state of mind that caused you to do something that you've acknowledged was inappropriate?

Judge CHATIGNY. This telephone conference took place at the end of a grueling week, with hours remaining before the execution. I believed that I had a duty to point out to this lawyer——

Senator KYL. Was it pressure? I'm trying to—because of the time here, trying to——

Judge CHATIGNY. I'm sorry.

Senator KYL. Was it—your explanation would be that you were under a lot of pressure, or what? I'm not trying to put words in your mouth, I'm just looking for an explanation because that is unacceptable behavior for a judge.

Judge CHATIGNY. I agree that the words I used were wrong and the pressure was intense. I would like to think that, even under intense pressure, I would now display calm detachment, which I surely did not display at the time. But it was a learning experience for me, to be sure.

Senator KYL. Judge, because of our timing rules our questioning is really chopped up here, so my first round of 5 minutes has now expired. I'll just carry on then where I left off next time I have a chance to query you.

Thank you.

Senator KLOBUCHAR. Thank you. And just since the topic of your temperament came up, I just want to put in the record that the Committee has received a joint letter from three former Republican-appointed U.S. Attorneys for the District of Connecticut:

Kevin O'Connor, U.S. Attorney from 2002 to 2008; Alan Nevis, U.S. Attorney from 1981 to 1985; and a U.S. district judge for that same district from 1985 to 1989; and Stanley Twardy, Jr., U.S. Attorney from 1985 to 1991, who wrote that they “support without any reservation the nomination of Judge Robert Chatigny to the U.S. Court of Appeals for the Second Circuit”.

In a letter dated April 16th, 2010, they wrote that they, “Have found him to be even-tempered, thorough, and without agenda”, as well as “a fair-minded and impartial judge” whose record in sentencing Federal criminal defendants shows that he is appropriately sensitive to the facts of the person before him and the rights of the victims of the crimes that have been committed. So I will include

this letter in the record.

[The letter appears as a submission for the record.]

Senator KLOBUCHAR. I would also note just one more clarification of the record, that in the Mukasey findings, that this was not found to be a reason for misconduct. I think they call it unusual, but they understood the circumstances. Is that correct?

Judge CHATIGNY. Yes.

Senator SESSIONS. Madam Chairman, are you——

Senator KLOBUCHAR. I'm just clarifying the record since——

Senator SESSIONS. Well, are you going to respond to each witness' testimony? Is that the way we're going to do it?

Senator KLOBUCHAR. Senator Sessions, it's your time to question and I'll go after that. Your turn.

Senator SESSIONS. Well, I would offer for the record the letter from Mr. Michael E. O'Hare, the supervising Assistant State's Attorney who represented the State in this case, who questions the wisdom of this appointment and the fitness of the nominee to serve who was there, participated, and saw what happened. I don't think this is a matter that is going to lightly go away, Judge. I wish it was, but it's just not going to be dismissed.

I have been a prosecutor and I have seen judges go beyond their proper role in hearings, and I believe you did in this case. I believe Mr. Paulding, the attorney for the defendant, conducted himself in a way he should have and that you did not. And so that's a problem for me. You have a good record. People like you. In other cases—there are some concerns in other cases. But I just have to tell you, I've seen the transcript and I didn't—not so much—I think it evidenced a lack of a proper understanding of your role in the matter.

So with regard to the competency hearing you testified to that occurred before the death penalty was carried out, this matter had been tried in the State courts of Connecticut, had been appealed to the Connecticut Supreme Court, and a competency hearing had been held and the death penalty had been affirmed by the highest court in the State of Connecticut, had it not?

Judge CHATIGNY. Yes.

Senator SESSIONS. And so what occurred, as I understand it, is that a letter came in from a prisoner at the last minute saying that the defendant may have been brainwashed and that somehow this caused a second competency hearing to occur. Is that correct?

Judge CHATIGNY. It was one of a number of things that happened to contribute to that result.

Senator SESSIONS. Now, with regard to that letter, when did that letter come in? Did that come in before the Friday teleconference?

Judge CHATIGNY. Yes. I believe it arrived 2 days before—two or 3 days before. I don't recall——

Senator SESSIONS. And Mr. Paulding had been in constant contact with his client, and as it turned out that letter was insubstantial and not proven to be dispositive of the issue of his competency.

And apparently, is it not true, that the client, Mr. Ross, the murderer, had decided he didn't want to appeal anymore? He felt that the judgment of execution was due to be carried out and he was prepared to accept it.

Judge CHATIGNY. Yes. And the issue before me was whether he

was competent to waive legal remedies.

Senator SESSIONS. And the attorney who has been working with him and been defending him that he chose—is that correct, or was he appointed?

Judge CHATIGNY. Senator, let me take this opportunity to clarify. His long-time defense counsel who had defended him over the course of the many years were the ones who came to the Federal court, claiming that he was not competent to waive legal remedies. The lawyer who was representing him at the time, Mr. Paulding, had been hired to advocate that he was competent.

Senator SESSIONS. By the defendant or his——

Judge CHATIGNY. By the defendant.

Senator SESSIONS. So the defendant wanted a lawyer to make clear that he didn't think he was incompetent and that he was prepared to accept his fate.

Judge CHATIGNY. Yes.

Senator SESSIONS. Which is consistent with what the competency hearing in the State had found, and consistent with what the appellate courts and the Supreme Court of Connecticut had found.

Now, tell me again. I have to ask this. Senator Coburn asked you about the letter that you wrote from your friend. Did you know—did you sign the letter?

Judge CHATIGNY. I signed an application for leave to file a brief, yes.

Senator SESSIONS. And was a brief—was it the brief that was filed?

Judge CHATIGNY. No brief was ever filed. My involvement was limited to filing that application for permission to file a brief, looking briefly at an issue and then informing my friend that I didn't think it was necessary or appropriate for me to be briefing that issue, that others could do it, and so my involvement ended.

Senator SESSIONS. So he did give you some indication of what the issue was apparently.

Judge CHATIGNY. Not really.

Senator SESSIONS. Well, you say you told him it wasn't appropriate for you to respond, or something to that effect. Surely you had some basis to make an evaluation of the merits of the case.

Judge CHATIGNY. Please understand that this was one issue of many and I was not involved in considering all the other issues. My consideration of this one particular issue was very limited. As I said before, I was not involved in the Ross litigation, except for that very brief involvement, which I unfortunately forgot. Had I remembered, I would have recused myself to avoid even a possible appearance of bias. But regrettable as it is, I forgot.

Senator SESSIONS. Well, my time has run at this point. You know, we want to be fair to you and we're going to do that. You need to have an opportunity to explain, and I've learned a few things in talking with you already I didn't fully understand. But we do have some more. Madam Chairman, I think we'll need to have some more time.

Senator KLOBUCHAR. Of course. Whatever time you need.

I just had some follow-up questions, Judge Chatigny.

Now, so what happened here is, you have this case, he's going to be executed, and then you get some information that the guy

that had found him, the medical expert who had found him competent to stand trial, was now doubting his opinion. Is that right?

Or wasn't sure if that was correct, or he might make a different opinion?

Judge CHATIGNY. The sequence needs to be clarified. The psychiatrist who evaluated this defendant in the State court competency proceeding contacted the defendant's lawyer soon after the telephone conference that we've discussed and told the lawyer that he had come into possession of material, actually writings, by this defendant that caused him to think that his opinion about the defendant's competence could change. That, together with other information that emerged, caused Mr. Ross's lawyer to move to stay the execution so that the issue of the defendant's competence could be reevaluated.

Senator KLOBUCHAR. And so you then had to make a decision. So the lawyer gets this information that the expert who had said his client was competent now isn't sure if he's competent, so he gives him that. So the lawyer—I just, as a lawyer myself, you would have an obligation to bring that before a judge.

So, now you look at this competency issue. I just remember, as a prosecutor, we would have these cases come up. I will be honest, as a prosecutor, we'd always want them to be found competent to stand trial even if they were like talking to tomatoes or whatever cases that we had. We did have one like that.

And sometimes we would concede it because it was so obvious, and sometimes it was a murky area, but a lot of times as a prosecutor we would fight to have someone declared competent. I'm sure you've seen that. But your obligation as a judge—let's say that you had just dismissed this and didn't even look at it and said, you know what? He's competent and I don't even want to give a chance to have a hearing on this. Then what if he was executed then and then someone had found that the lawyer—that this lawyer hadn't brought it up or hadn't done anything about. What would have happened to that lawyer?

Judge CHATIGNY. Well, that was my concern. I undertook to warn Mr. Paulding of the potential consequences if he failed to act and his client was executed in violation of his constitutional rights. I was trying to do the right thing to protect the integrity of the system. If we were going to have an execution we should do it right. This was the first one in 45 years, and I thought it was important that it be done carefully.

Senator KLOBUCHAR. So it wasn't your belief that somehow he shouldn't be executed or——

Judge CHATIGNY. No.

Senator KLOBUCHAR. Even that he didn't do the deeds. It was that—and the horrific crime. It was that the procedure at hand, you felt especially if it was this landmark execution, horrific case, public focus, and you wanted it to be handled in the right way, is that what you're talking about?

Judge CHATIGNY. Yes. And as it happened, Mr. Paulding prepared a motion for a stay of the execution for filing in Federal court, and recognizing that these unusual events of the past week had created an unfortunate situation, I urged him to file the motion in State court, out of respect for the State court, to give the

State court an opportunity to act on that, and he did. The State court granted the motion, held the competency hearing, made the finding that the defendant was competent, and in the end that's how it turned out.

Senator KLOBUCHAR. And then one other clarification. During this three-judge panel, looking back at this case with all of its facts and evidence, Michael Ross's lawyer, who is J.R. Paulding, testified that he did not feel pressured, but sought a postponement of the execution based on his own view of the evidence and his duties as a lawyer. Is that correct?

Judge CHATIGNY. Yes.

Senator KLOBUCHAR. OK.

Judge CHATIGNY. And I feel particularly badly about what occurred because I think that Mr. Paulding did his conscientious best in the circumstances.

Senator KLOBUCHAR. And then after that happened, when the three-judge panel issued its decision, it actually said that, "while the judge used strong language, there was no misconduct. Under the proper circumstances, a judge may deliver a warning that threatens a misbehaving attorney with disciplinary action or contempt citation by the judge, or referral to another disciplinary authority without necessarily interfering with any legitimate right of the attorney or the attorney's client."

Again, these were three judges: Second Circuit Chief Judge Walker, who was nominated by President George H.W. Bush; Judge Pierre LaValle; and then Southern District of New York Chief Judge Michael Mukasey, who as we know later went on to serve as the U.S. Attorney General under George W. Bush.

And I understand that Mr. Mukasey is publicly supporting your nomination. As we know from Senator Sessions' statement, that he had called him. Is that correct?

Judge CHATIGNY. Yes.

Senator KLOBUCHAR. All right.

So again, I want to thank you. I would love to talk to you. I think you've had like 450 opinions. Is that correct?

Judge CHATIGNY. Yes.

Senator KLOBUCHAR. And only 16 of them have been reversed. Who's counting? I don't know.

[Laughter.]

Senator KLOBUCHAR. Something like that. Or been maybe taken up to be reconsidered broader, than reversed.

But I want to thank you for your patience. I know my colleagues have some other questions. Thank you very much.

Judge CHATIGNY. Thank you.

Senator KYL. Madam Chairman, Senator Coburn has graciously agreed to let me go ahead.

Senator KLOBUCHAR. Senator Kyl.

Senator KYL. Let me go ahead. As is the case sometimes, things interfere with this hearing, and I apologize, but I only have a minute before I have to go to another commitment.

I've got two questions, each with a subpart. Let me go back to this conference that we talked about before. You, in this conference, cited your own personal experience in an unrelated matter, touring the prison where Mr. Ross was held. I gather this was not a part

of the record in the case before you. Was that an appropriate thing under those circumstances?

And I guess, second, you also referenced abundant literature that you had read on the issue, noting that most European countries would refuse to extradite prisoners if a prisoner was going to end up “in that setting.” I think you were referring to that particular prison.

I guess the second part of this question is: how does that inform, or do you believe that this is an appropriate reference for you to inform interpretation of U.S. case law?

Judge CHATIGNY. Senator, dealing with the first part of the question, I had toured the facility in connection with another case and I wanted to put that on the record so that Mr. Paulding and others would know what was in my mind. In the ordinary case, a judge would not take into consideration things outside the record, but this was an emergency proceeding and I felt I had an obligation to disclose that, partly because I wanted to do my best to focus Mr. Paulding’s attention on what was going on. And I——

Senator KYL. I’m sorry. Because of the time—I appreciate that.

Judge CHATIGNY. I’m sorry.

Senator KYL. Can you get to the second part of the question regarding the foreign law?

Judge CHATIGNY. Yes.

Senator KYL. This is a matter of great concern to those of us who don’t think it appropriate to resolve U.S. cases on the basis of foreign law.

Judge CHATIGNY. I understand. And I have never used foreign law to decide an issue before me and I can’t envision a circumstance in which I would. My point here was to impress upon Mr. Paulding that the conditions of the defendant’s confinement could exacerbate his mental illness, as alleged. As it turned out, after the full evidentiary hearing in State court, that proved not to be so. But at the time I spoke, I had an allegation that it was so and I went forward for that reason only.

Senator KYL. Well, what did European extradition experience have to do with that?

Judge CHATIGNY. Only insofar as they relied upon empirical evidence regarding the effect of long-term solitary confinement on inmates, and for no other reason.

Senator KYL. Let me switch to a second subject. After the teleconference and after the Supreme Court affirmed the Second Circuit’s reversal of the temporary restraining order and there were no additional impediments to his execution, which was then set to occur at 2 a.m. on the following morning, about 3 hours before the scheduled execution you directed the clerk of your court to call the Execution Command Center and request the number of Judge Patrick Clifford, who was the State trial court judge in the case. Is that correct?

Judge CHATIGNY. Yes.

Senator KYL. Now, given the fact that there was no longer any matter pending before you, and I gather there was no motion on the part of any party, why did you do that?

Judge CHATIGNY. I wanted the judge to know that I was available in case he wanted to speak with me. I thought there was a

chance he might hear from Mr. Paulding and he might want to seek clarification from me.

Senator KYL. Did you speak with him, with the judge?

Judge CHATIGNY. No.

Senator KYL. Did you also try to contact the chief justice of the Supreme Court, Justice Sullivan?

Judge CHATIGNY. No.

Senator KYL. Do you believe now that it was appropriate for you to call to volunteer that if they had any questions, that you'd be happy to try to answer them?

Judge CHATIGNY. I do.

Senator KYL. The thing that is in my mind in this line of inquiry is that it appears to me that you believe that anybody who could commit such a heinous crime must be mentally unfit, and it appears to me that you take an undue interest—even though I appreciate the fact that you said if there's going to be an execution you

want to make sure it's done right—and were very exercised about the way you discussed this with counsel. Would you care to comment on my—on this perception that I have?

Judge CHATIGNY. Yes. Thank you for giving me the opportunity. I can well understand why you would have that perception. It's unfortunate that the Ross case gets in the way of the record of my work day-to-day in all kinds of cases over the course of 15 years. It is not a reliable indication of my character as a judge or my work as a judge. Again, I believe I did the right thing, but I went about it the wrong way. For that, I'm sorry.

Senator KYL. I appreciate that. There were some other questions that I wanted to ask concerning some other decisions that you were involved in and I think we'll have the opportunity to put those questions on the record for you. I would appreciate that.

[The questions appear under Questions and Answers.]

Senator KYL. And for those family or friends who are here, I wasn't here at the beginning so I don't know exactly who everybody in the audience is. I hope that everyone appreciates that the Senate has an obligation, a very serious obligation to the U.S. Constitution, to provide advice and consent to the President on his nominations. Just as your responsibilities require rigorous investigation, Judge, I am sure that those who are representing you here today can appreciate that our responsibility requires the same.

I appreciate your responsiveness and I apologize for having to leave now.

Judge CHATIGNY. Thank you.

Senator KLOBUCHAR. Thank you very much, Senator Kyl. Thank you for being here.

Senator Coburn.

Senator COBURN. Let me go back. I think I heard you, and you need to clarify this for me. What was the reason you did not file an amicus brief on the Ross case?

Judge CHATIGNY. The issue that was suggested for briefing seemed to me to not warrant a brief on behalf of the Criminal Defense Lawyers Association.

Senator COBURN. Is it not true that you were written by Mr. Ross after you'd filed a motion to file an amicus brief, and that you

wrote him back saying your involvement was when the case was over?

Judge CHATIGNY. Yes.

Senator COBURN. OK. Thank you.

And you didn't have any recollection of that prior to this case?

Judge CHATIGNY. I did not.

Senator COBURN. All right. Thank you.

I want to go back to the interaction with Counselor Paulding and just clarify for the record a little bit. Paulding only filed a stay after he had what he believed at that time was an implied threat.

Would you agree with that?

Judge CHATIGNY. Senator, I believe Mr. Paulding has stated that he did not feel threatened and that he sought the stay based mainly on his conversation with Dr. Norko and his duty to the courts to bring to their attention new information or evidence bearing on the issue of his client's competence.

Senator COBURN. Then why would Mr. Ross testify in front of you that the only reason he agreed to go along with the filing of the stay is to "protect Paulding's law license" ?

Judge CHATIGNY. There was no such testimony by anyone before me.

Senator COBURN. It was in the Supreme Court, in the State Supreme Court.

Judge CHATIGNY. That was not the position he took.

Senator COBURN. That's a direct quote: "protect Paulding's law license," from the State Supreme Court.

Let me move on, if I may. Do you believe that there is a mitigating factor in all death penalty cases?

Judge CHATIGNY. No.

Senator COBURN. Do you believe that in sexually related crimes such as Ross's, that there usually is a mitigating factor?

Judge CHATIGNY. No.

Senator COBURN. How much time did you spend researching mitigating factors when you were first asked to look at Mr. Ross's record by the—I think it was the Connecticut trial bar, benevolent——

Judge CHATIGNY. I don't recall doing any research into mitigating factors.

Senator COBURN. Thank you.

Judge CHATIGNY. I think it was an evidentiary issue, but I don't recall.

Senator COBURN. It should be noted for the record, at the time of your conversation with Mr. Paulding, you were a member of the Grievance Committee of the U.S. District Court for the District of Columbia. Is that correct? Would your statements to Mr. Paulding carry more weight considering you were on the Grievance Committee versus a judge who was not on the Grievance Committee?

Would you, as a reasonable man, tend to think that it might carry more weight?

Judge CHATIGNY. Senator, I'm not sure. And I'm trying to recall if I was a member of the Grievance Committee at that time. I don't recall. But certainly, you're right. A forceful statement to a lawyer will tend to have an impression, and I do regret that my words to Mr. Paulding were harsh.

I would want to be clear. You referred to Mr. Ross's testimony.

I believe he gave that testimony in the subsequent State court proceeding.

Senator COBURN. Yes, he did.

Judge CHATIGNY. I don't want to leave you with the impression that I doubt that he did that.

Senator COBURN. No, no. No. I understand that. Thank you. Let's move off that for a minute. I'll bet you'd like to move off of it, and so would I. Thank you for being so cooperative.

In *Doe v. Lee*, you held that the Connecticut Sex Offender Registration Act was unconstitutional. The U.S. Supreme Court unanimously reversed your decision. Specifically, the court rejected your conclusion that a violation of a liberty interest occurred because the law implied that all registrants are currently dangerous and imposed onerous registration obligations, relying on its previous

precedent established in *Paul v. Davis*, that mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest.

Why did you disregard prior Supreme Court precedent in that ruling?

Judge CHATIGNY. Senator, as in every case, I did my best to faithfully apply the law. In that case, a procedural issue was presented. I studied the relevant precedents of the Second Circuit, did my best to follow them. I concluded that due process did require that a hearing be held in a circumstance where a——

Senator COBURN. I'm out of time. Let me just ask one other question.

You're not responsible just for the precedents of the Second Circuit, you're responsible for the precedents of the Supreme Court as well, correct?

Judge CHATIGNY. Yes.

Senator COBURN. Thank you. I'll yield back and I'll wait for the next round.

Senator KLOBUCHAR. Okay. Thank you.

And just to clarify that issue, you did not actually strike down Megan's Law, is that correct?

Judge CHATIGNY. No. I ruled that due process required a hearing. The Second Circuit affirmed. The Supreme Court——

Senator KLOBUCHAR. And they unanimously affirmed?

Judge CHATIGNY. They did. The Supreme Court unanimously reversed.

I, of course, accept their ruling as the law of the land and have no difficulty whatsoever following it. But I did my best to apply the law as I understood it.

Senator KLOBUCHAR. And again, you didn't strike it down. It was a procedural issue, that you felt that there should be—you felt that there should be an additional procedure.

Judge CHATIGNY. To be clear, under Connecticut's registry, nondangerous registrants and dangerous registrants were lumped together.

There was no differentiation. The plaintiff claimed to be non-dangerous and he wanted an opportunity to prove that at a hearing before he was listed on the registry. Under applicable precedent, Supreme Court and Second Circuit, I concluded that he was right, and on that basis I said you can't put these people on the registry without giving them a hearing. The Court of Appeals agreed. The Supreme Court unanimously disagreed and the registry is in effect.

Senator KLOBUCHAR. Okay. Thank you.

Senator Sessions.

Senator SESSIONS. Judge, as a trial judge you have the authority on motion, if contempt is executed in your presence, to discipline lawyers, do you not?

Judge CHATIGNY. Yes.

Senator SESSIONS. And lawyers know that and they respect the power of a judge. I have to say that your comments—really, threats—to Mr. Paulding were inappropriate. Would you agree?

Judge CHATIGNY. I would agree that the words I used were excessive, yes.

Senator SESSIONS. And you also said at that time, “We’re not in this profession to help people get killed.” A lawful execution does not meet my definition of killing. Do you think that’s a bad choice of words?

Judge CHATIGNY. Very much so.

Senator SESSIONS. And then when you said to the lawyer, “what you’re doing is terribly, terribly wrong”, and you went on to say, “I do not know how anybody in your position could be accepting of this responsibility and proceed in the face of this record to be the proximate cause of this man’s death.”

Then you, I think, went on to basically threaten him. You said, “Then you better make a clear record of it. You better have a court reporter there taking down the advice you’re giving him, because believe me, you’re going to need it. You’re going to need it.”

Do you feel like—it seems to me the lawyer was representing a client who had had a full panoply of appeals and was ready to accept his fate, and it seems to be a mentality among some in our legal system that the death penalty must be resisted at virtually all costs, and we go to every possible effort to delay its coming.

Do you agree that you have a right, when the time is ready, that the defendant is ready to be executed, that he should be executed?

Judge CHATIGNY. Yes, if he’s competent, then that’s his choice.

Senator SESSIONS. Now, during this call you said this that worries me: “Looking at the record in light most favorable to Mr. Ross, he never should have been convicted.” How could you say that?

Judge CHATIGNY. Here again, Senator, I appreciate the question because it gives me an opportunity to clarify and to address your understandable concern. I was trying to explain to Mr. Paulding that the significant evidence casting doubt on his client’s competence pervaded the case.

The issue of guilt was not before me. That issue had been determined, but the issue of competence was before me and his history of mental illness was clearly relevant to that issue. His prior counsel had defended the case based on an insanity defense, later based on his mental disorders. And I regret that I used words that suggested I had an opinion about this defendant’s guilt or that I was concerned about his guilt. I was not. I—my sole concern was whether he was competent to waive legal remedies. It was a learning experience, as I said. If I had it to do again I would certainly do it differently.

Senator SESSIONS. Well, you said “he should never have been convicted” and then went on to say “or if convicted, he never should have been sentenced to death because sexual sadism is clearly a mitigating factor.” Can you cite any authority in which sexual sadism

has been defined as a mitigating factor?

Judge CHATIGNY. No.

Senator SESSIONS. Well, I don't think there is any. I'm rather—it seems to me that would be, if anything, an aggravating factor.

Judge CHATIGNY. My intention was to call Mr. Paulding's attention to the record of the defendant's disorders, including that one, solely to impress upon him the need to reassess the issue of his competence to waive legal remedies.

Senator SESSIONS. Well, you said that there was significant evidence raising questions about his competency. I don't know that there was a scintilla of evidence. I guess this letter, if you chose to see it as something of value, could have been seen as some minor possibility of a competency question.

But really, the attorney, Mr. Paulding, was in contact with his client who had been—and didn't take this seriously. All it was was a letter from a person in jail, maybe trying to help out a fellow prisoner, if he could frustrate the system, it sounded like to me. There was no real credible facts stated in that letter that would make me think that there was a real significant question of competency. Wouldn't you agree?

Judge CHATIGNY. I do agree. I realize now that there's an important point that needs to be clarified. At the emergency hearing on the application for the stay, the plaintiffs proffered evidence on the subject of the defendant's competence, including expert testimony, which had not been considered by the State court.

It was against the background of that evidence that we subsequently saw new evidence emerge, but the evidence that concerned me at the very beginning was this evidence proffered at the emergency hearing, including expert psychiatric evidence, which had not been part of the competency hearing in the State court. I am sorry I didn't clarify that earlier.

Senator SESSIONS. Well——

Judge CHATIGNY. When the competency hearing was reconvened in State court, there were expert witnesses on both sides who testified on that issue. The trial-type proceeding took approximately a week, with two experts on both sides of the question, and then the State judge wrote a careful, thoughtful opinion, finding that the defendant was competent.

Senator SESSIONS. But the Connecticut Supreme Court had also reviewed it previously in the record of the previous competency hearing and found him adequate, did it not? So you were just second-guessing their decision based on a letter from a prisoner. Excuse me. He should be able to answer that and I'll give you more time. I've gone beyond my time.

Judge CHATIGNY. I believe strongly that a district judge should defer to the State court, and I do that. In this unusual case, I believed that the allegations that were made and the evidence that was presented to me in support of those allegations raised a sufficient issue about competence to require a further review, in no small part because there had been no adversarial hearing in the State court where the issue could be tested, as we test issues in our system.

Senator KLOBUCHAR. OK. Thank you.

Judge Chatigny, I just want to go back over this, your sort of exacerbation

at the hearing and why you felt that way and used that language that you now regret. And I was actually listening to it, thinking about times that I've been before judges who get mad, even in civil cases, about things. Some of the words you used remind me of other words I've heard, so it didn't really surprise me, but they don't usually get litigated because it never comes out. But I've heard judges use very strong language at lawyers, and that's no excusing it, I just have.

And so, but one of the things I found interesting was just this succinct statement by the panel, the Second Circuit conclusion, about some of the things you had said in exchange with the lawyer, who as we know has already said that he didn't feel pressured, and I'll get to that in a minute.

But they said, "The words cannot be read in isolation. The proceeding colloquy clearly shows Judge Chatigny's growing exasperation with the fact that Ross was about to be executed based on his waiver of legal remedies in the face of a reasonable possibility", and you've already told Senator Sessions that if you felt that he was firmly competent, had no questions about that, the fact that he waived his remedies and was going to be executed, that wouldn't be a problem for you. Is that correct?

Judge CHATIGNY. That's correct.

Senator KLOBUCHAR. So you said that—what they say is that "in the face of a reasonable possibility that he was not competent to give such a waiver", so you have this situation where this new evidence has come before you from his lawyer, so you're concerned that he may not be competent, and at the same time you have a lawyer—the Second Circuit stated, "his lawyer was refusing to take steps to examine new evidence casting doubt on his client's competence. The judge was clearly concerned that Paulding's", that's the lawyer, "reluctance to engage the court in the question of Ross's competence, based on Paulding's sense that he was bound by his client's instructions, might cause an unconstitutional execution." So once again, your concern was not that you didn't want to do the death penalty or you had a problem with it, it was that you were concerned that this could be found to be unconstitutional and you wanted to have it done right.

Judge CHATIGNY. That's true.

Senator KLOBUCHAR. And the lawyer—and I can understand where the lawyer is coming from—feels lawyers should do what their client says. But from your standpoint, and the case law shows, the first question the lawyer has to ask is, is my client competent or not.

Judge CHATIGNY. That's correct.

Senator KLOBUCHAR. And that's why I can understand you got a little heated, whether it was right or not, in trying to make sure that lawyer understood that, that, yes, you're bound by what your client says but you've got to make sure he's competent. OK. So, the other piece of this is just some of the things that we heard about your feelings on the case itself, and what you were trying to do here was to make sure the procedures were followed.

That's right?

Judge CHATIGNY. Yes.

Senator KLOBUCHAR. OK. And I'd just note that again, in the

Second Circuit decision, that it says—they say, “There is no indication that Judge Chatigny sought to nullify Ross’s death sentence.

Rather, the transcript clearly reflects his focus on insuring that a proper competency determination be made.”

Then one other thing I wanted to put on the record here was that 17 former Federal prosecutors who worked with or appeared before you wrote to this Committee about their “conviction in his integrity and fitness to serve on the Court of Appeals”. In an April 27, 2010 letter, they describe you as “unfailingly respectful of others and their views with no axe to grind”, and asserted that, “in criminal as well as civil matters, Judge Chatigny has proven himself over the course of 15 years on the bench to be unbiased, compassionate, and temperate.”

So I’d like to put that letter on the record as well in addition to the ones that we heard from the chief U.S. Attorneys that were included in the record.

[The letter appears as a submission for the record.]

Senator KLOBUCHAR. Just one other follow-up. You’ve had how many cases? Do you remember how many cases you’ve had in your career as judge?

Judge CHATIGNY. Thousands.

Senator KLOBUCHAR. I think someone told me you had 4,000 cases.

Judge CHATIGNY. That sounds right.

Senator KLOBUCHAR. OK. And you’ve issued 450 decisions.

Judge CHATIGNY. I thought perhaps more. I think I’ve had approximately 450 criminal defendants come before me for sentencing.

That’s an estimate. The number of opinions, I’m not sure.

Senator KLOBUCHAR. And most of those—we discussed almost all of those cases have been upheld. I think I had the number, 16 cases had been reversed. Is that right?

Judge CHATIGNY. I believe so. I’m not sure.

Senator KLOBUCHAR. And have you had other cases where you had to deal with competence and make sure that the defendant was competent to stand trial?

Judge CHATIGNY. Yes.

Senator KLOBUCHAR. Is it something that you are acutely aware of when you go into these cases?

Judge CHATIGNY. Yes.

Senator KLOBUCHAR. Do you think other judges are concerned about that as well?

Judge CHATIGNY. I do.

Senator KLOBUCHAR. OK. I was thinking your son is over there. Oh, one has left. It’s just too much. I’ll talk to him later. When you think about all of these cases you had, the 4,000 cases and all of the work you’ve done as a judge, what are you most proud of? It might not be one case, but just of the work and your judicial philosophy, what you’ve done as a judge that you would want them to know.

Judge CHATIGNY. Well, thank you for that question. I would say that I’m proud of doing a fair and honest job of it day in and day out and trying to do my part to maintain public confidence in a system of justice that I revere.

Senator KLOBUCHAR. OK. Thank you very much.

I think Senator Coburn is next.

Senator COBURN. Thank you. I'd like to enter into the record an affidavit submitted by Mr. Golub of the Connecticut Criminal Defense Lawyers Association which states that in fact the particular issue you agreed to research related to establishing mitigating factors for death penalty cases.

[The affidavit appears as a submission for the record.]

Senator COBURN. The other thing I wanted to raise with you is, are you aware of Federal statute 28 U.S.C. 2254(e)?

Judge CHATIGNY. I believe so.

Senator COBURN. OK. It states that in Federal habeas corpus proceedings, factual determinations of State courts shall be presumed to be correct.

Judge CHATIGNY. Yes.

Senator COBURN. And as I understand it, the Connecticut courts considered and rejected the allegation that Mr. Ross was not competent when he decided not to pursue further appeals, and that in the hearing on the public defender's habeas corpus petition, however, you said that this finding was "not binding on me, it can't be".

Is that accurate?

Judge CHATIGNY. Yes.

Senator COBURN. And why is it not binding on you?

Judge CHATIGNY. Because the procedure that was followed was limited and I was presented with evidence raising a substantial issue on a matter of life and death.

Senator COBURN. Thank you.

I want to go back to one other area and then I'll finish, and I'll have some questions for the record.

You gave a speech at the American Constitution Society at the University of Connecticut Law School in which you criticized mandatory minimums because "empathy for individuals in a case inevitably comes into play, as it should". Does empathy factor in your decisions in a courtroom?

Judge CHATIGNY. No.

Senator COBURN. Just in sentencing?

Judge CHATIGNY. Not in sentencing.

Senator COBURN. Well, explain that statement to me then. You criticized mandatory minimums in that speech, and your following statement was, "empathy for individuals involved in a case inevitably comes into play, as it should".

Judge CHATIGNY. Well, I recall the speech. I don't recall the comment.

Senator COBURN. Well, that's a quote exactly.

Judge CHATIGNY. Yes. I don't doubt that I made the comment. I believe I was referring to not just the defendant, but also the victims, as well as witnesses when I referred to the individuals, plural, in a case. I think that it is important, in a criminal case at sentencing, for a judge to be conscious of the interests of all concerned, but the decision needs to be based on the facts and the law.

Senator COBURN. In the same speech you said, "We shouldn't try to drastically reduce departures. Departures are essential. The purpose of the Federal Sentencing Guidelines is to provide consistency and uniformity." I agree with that. "That way the sentences imposed for the same crimes do not vary widely depending on the judge the defendant happens to draw on."

What factors do you consider in deciding whether or not downward departure is appropriate?

Judge CHATIGNY. I consider the presentation made by the parties, I look at the guidelines with care, and I ask whether, on the facts before me, a departure under the guidelines is warranted. I recognize——

Senator COBURN. You're not out of line with all the rest of the judges, so I don't want to make that point. I think you've followed that fairly well. I do have some questions, however, on six child pornography prosecutions and one sexual tourism case. You've departed on those cases.

The reason I'm asking the question is, we have a sexual sadism case which looks like you're sympathetic towards, we have Megan's Law, which you're trying to give a greater constitutional right than what the Supreme Court ultimately said was there, and then we have this instance of child pornography in which you're going against the Sentencing Guidelines. And I may have as well, but the reason for the question is, you put all these together, it creates a story that would appear that you're soft on sexual crimes, sexual pornography, and abuse of children. I know you're not and I'm not saying that, but you can understand why those questions should be asked.

Judge CHATIGNY. Yes. Absolutely. I recognize that a narrative has developed here that depicts me in this way, and I can assure you that child pornography is abhorrent to me, and if I have departed it is only because the facts and the law seem to demand it.

Senator COBURN. Thank you very much. You've been very cooperative. Appreciate it.

Judge CHATIGNY. Thank you.

Senator KLOBUCHAR. Senator Sessions.

Senator SESSIONS. Thank you. I know you've handled a lot of cases, some 4,000 cases. But can you think of any case in which you've injected yourself more personally into than this case involving a sexual predator who murdered, admittedly, eight women?

Judge CHATIGNY. I cannot. I have spent years working on other cases. This case took about a week, actually, just a week. I've given a lot of thought to other cases, and in that way invested myself heavily in them. But you're right, this case is unique.

Senator SESSIONS. I know this judicial panel ruled that you shouldn't be disciplined, but there are statements read by our distinguished chairman, who's a good prosecutor and knows the law, but this was basically not an affirmation of your conduct in that hearing, but a finding, according to your fellow judges, that you had not violated the Code of Judicial Conduct. Would that be right?

Judge CHATIGNY. Yes.

Senator SESSIONS. I don't think we should overstate that.

When you said in your sentence—you said he shouldn't have been sentenced—“shouldn't have been convicted”, then you said “he shouldn't have been sentenced to death because sexual sadism is a mitigating factor—clearly, a mitigating factor”, which is finding of major proportions without any record to back it up, I would suggest, but you also said, I think, in that hearing that Ross was “the least culpable, the least of people on death row”. Did you say that? What did you mean by that?

Judge CHATIGNY. Thank you for the question, Senator, because again I recognize that there is a valid basis for concern and it gives me an opportunity to explain. I was terribly concerned that an execution was about to occur when the issue of mental competence had not been properly evaluated.

In trying to impress that upon Mr. Paulding, I pointed out to him that if you looked at the record in the light most favorable to the defendant, all of these things could be said. Why was that relevant?

Because they all pertain to his mental illness. His previous counsel had said that he was so ill that he was not guilty, that he was so ill he was not eligible for the death penalty. Mental illness pervaded the case and I was trying to focus attention on that so that the lawyer would reassess his position before it was too late. Senator SESSIONS. Well, it wasn't any question about his guilt. He had confessed to that and the evidence was overwhelming. So a defense lawyer has got to have some defense and insanity is the only one left, I suppose. So just because defense counsel pleaded guilty and urged that his client was incompetent in a case like this, I think he was probably making the only argument or plea that could be made. But you gave that great weight, his personal statement that he thought he was—did you take a personal statement from the counsel or did you just review the record of the State court process by which they pled mental competency?

Judge CHATIGNY. I reviewed the record, such as it was, in the very limited time available to me. And I must say—

Senator SESSIONS. How would this make him the "least culpable of people on death row"? What did you mean by that?

Judge CHATIGNY. If, as has had been claimed, he was in fact severely mentally ill, and given the clear relevance of his history of severe mental illness to the issue of his competence to waive legal remedies, I felt that this was a way of addressing the matter with Mr. Paulding's lawyer that might cause him to reassess his position, as I believed he had an ethical obligation to do.

Again, I regret my choice of words. I did the best I could in the circumstances to follow the law and discharge my responsibility. I fell short of doing it as I would have wished, in retrospect. I treat it as a learning experience.

Senator SESSIONS. Well, I understand that.

Let me just ask one more thing. Now, in the first hearing before we had this teleconference and this occurred, you found that the State should—you stayed the execution and you found that he was entitled to another hearing on competency. The Second Circuit went along with that. They tried to give—all judges are given some deference. But the Supreme Court, by a 5:4 majority, said even giving deference to the trial judge's decision processes, there was insufficient evidence to order a delay. At that point you didn't have this letter from the prisoner, is that right?

Judge CHATIGNY. I can't recall the timing exactly, but that letter cropped up while the case was on appeal, as I recall.

Senator SESSIONS. Well, Madam Chairman, you know these are tough hearings and we take a person with thousands of cases. You know that story about the law, as the cloud comes over the city and the lightning bolt comes out of the sky and says you're negligent?

Senator KLOBUCHAR. That's us.

Senator SESSIONS. It's one person and he's declared negligent, or you're declared to be in error. You have a lot of friends, Judge, and you've obviously done good work on the bench. I don't think your integrity has been questioned. So we'll be glad to look at this.

I have a strong feeling that our Federal courts have forgotten their role in these cases. Until the last 50 or so years, cases weren't retried in Federal court. When you got an affirmance by the Supreme Court of a State, it was presumed to be final.

Now we have Federal judges that think they want to review everything, second-guess State courts, cost thousands of dollars, delay executions, and the Supreme Court, in the reversal of your case, I think, was a statement: judges, you've got to be careful, you're overreaching here. This does not call for another hearing based on the record that they went up to. They see them from all over the place.

So my fundamental concern is along that line, not with you in any personal way. I appreciate your testimony. I think you've been patient with us and I think you've endeavored to be honest and fair in answering the questions.

Thank you very much.

Judge CHATIGNY. Thank you.

Senator KLOBUCHAR. I appreciate your closing comments there, Senator Sessions. Again, Judge Chatigny, I mean, despite that people may have disagreements on what the role of a Federal court judge should be here, but do you feel, based on the Constitution, based on cases handled by Circuit Courts in the past, that you had a duty to look at that competency issue and make sure that this defendant, however horrific he was, was competent before an execution, a decision before he could waive his rights and be executed?

Judge CHATIGNY. Yes.

Senator KLOBUCHAR. All right.

Senator SESSIONS. Madam Chairman, I'll offer Senator Grassley's statement for the record.

Senator KLOBUCHAR. OK.

Senator SESSIONS. He wished to be here and expressed his interest in the issues of the case, but had to be at another matter.

Senator KLOBUCHAR. Well, thank you very much, Senator Sessions. We'll include that.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Senator KLOBUCHAR. I also just want to include the—you know, we've been—I loved Senator Sessions's reference to the lightning bolt coming down on one case. But just to clarify here, put on the record, that in more than 15 years as a Federal judge, the government has never appealed a single one of your sentences. As Senator Coburn noted, your downward departure rate was completely in the range of other judges, and he acknowledged that, even though he touched on a few cases with which he disagreed.

And as much as he may have mentioned cases where you had downward departed again in the range with other judges, you've also had some cases where you've given out maximum sentences. In 2001, a cocaine dealer, 20 years, maximum sentence allowed by law. There you had the dealer's defense attorney publicly attacking you for imposing such a harsh sentence. Those were not the cases

were brought up today. They were not brought up, but there are cases like that and we acknowledge that as we look at your record of 4,000 cases.

So I just want to thank you for appearing before us. As the other Senators have noted, you showed much patience, as did your family. Your other son did return, but now he's gone, and they have been standing by your side at every moment. I can tell that, and they care very much about you. We look forward to working with you in the weeks to come here.

Thank you very much.

Judge CHATIGNY. Thank you so much. Thank you.

Senator KLOBUCHAR. Well, thank you very much, Senator Sessions.

Thank you, Mr. Gibney. Now, we could just hang out and see if our colleagues return to ask you questions or we could adjourn the hearing.

So I want to let everyone know that the record will remain open for 1 week, and we wish you good luck, Mr. Gibney. We're all impressed by your credentials. I don't want to speak for everyone, but we're impressed—I'm impressed by your credentials, as well as Judge Chatigny's. I want to thank you for this civil hearing and that we're able to complete it, and having your family here I'm sure is special as well.

DENNY CHIN
WEDNESDAY, NOVEMBER 18, 2009
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, Pursuant to notice, at 2:30 p.m., Room 226, Dirksen Senate Office Building, Hon. Charles E. Schumer, Chairman of the Committee, presiding.

Present: Senators Schumer, Kohl, Feingold, Klobuchar, Franken, and Sessions.

PRESENTATION OF DENNY CHIN, NOMINEE TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT BY HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Now, I will read my statement introducing, from my home State of New York, Judge Denny Chin, who is a nominee for the Second Circuit Court of Appeals, what we would like to think is one of the most important circuit court of appeals in the country, along with the others. I do not want to offend my colleagues.

[Laughter.]

Senator SCHUMER. Judge Chin is also, not incidentally, a classic product of New York upbringing. I am so proud to introduce him here.

His family brought their own culture from Hong Kong to America and earned their own advantages through sweat and hard work.

Within one generation, his family raised a child who rose to the top of his profession.

Judge Chin was born in Kowloon, Hong Kong, came to the United States when he was 2 years old. His father worked as a cook. His mother worked as a garment factory seamstress in Chinatown.

Judge Chin grew up in a cramped tenement in Hell's Kitchen with is four siblings, but his parents clearly did something right. Denny Chin graduated from the renowned Stuyvesant High School. We just had before the Judiciary Committee Judge Holder, another graduate. I don't know if you graduated at the same time.

My daughter went to Stuyvesant and my favorite thing about them, they are very bright people, it is hard to get in, their teams are not that good and they know it, because the mascot of the team is the pegleg. They are called the Peglegs after Peter Stuyvesant. Anyway, it is good to have a pegleg here with us.

Judge Chin went on to earn his BA magna cum laude on a full scholarship from Princeton University and he received his law degree from the Fordham University School of Law. After school, he clerked on the District Court for the Southern District of New York and went on to work as an associate at Davis Polk & Wardwell. He heeded the call of public service, became an assistant U.S. attorney in the southern district for 4 years, then struck out and founded his own firm.

Throughout my term in the Senate, I try to give advice and consent to the President on judicial nominees by applying three criteria—excellence, moderation and diversity.

Excellence, they should be legally excellent. If you look at Judge Chin's record as a district court judge, he clearly is excellent. The Almanac of the Federal Judiciary describes him as a judge's judge, conscientious, extremely hardworking, very bright and an excellent judge.

My second criteria is moderation. I do not like to choose judges too far right, obviously, but, also, too far left, because I think judges at the extremes try to make the law rather than interpret the law. Again, Judge Chin is known as a tough, but fair sentencing judge.

He is best known for sentencing the Ponzi scheme operator, Bernard Madoff, in a case that could have been a complete circus, because there were hundreds of victims who had lost everything.

Judge Chin ran the proceedings with dignity and efficiency and when he sentenced Judge Madoff, he said, "The message must be sent that Mr. Madoff's crimes were extraordinarily evil and that this kind of irresponsible manipulation of the system is not merely a bloodless financial crime that takes place on paper, but that it is one that takes a staggering human toll."

He is not afraid of unpopular views. He ruled that the New York Black Panthers could not be denied the right to march based on, quote, "disapproval of anticipated content," and he has the support of former Attorney General Michael Mukasey and Republican-appointed U.S. Attorney John Martin, who hired him 30 years ago and has practiced before Judge Chin.

On the issue of diversity, I think I have given advice and consent to the President on 10 or 11 judges. There is only one white male, because I think we should have more women and minorities on the bench. Judge Chin already has the distinction of being the only Asian-American to serve on the Federal District Court outside the Ninth Circuit and, with his confirmation, he will be the only currently active Asian-American appellate judge on the Federal bench.

He explained the importance of diversity in clear terms when he wrote, "If there were more minority judges and lawyers in the profession, lawyers might not question a minority judge's fairness because of his or her race; lawyers might not presume that a minority judge is biased because of some sort of absurd notion that the judge might feel beholden to someone of the same racial or ethnic group who supposedly was in a position of power." These are great words and they say it better than I could.

So it is my honor to introduce Judge Chin for nomination to the Second Circuit Court of Appeals.

[The prepared statement of Senator Schumer appears as a submission for the record.]

Senator SCHUMER. With that, let me ask all of the nominees to come forward. We have Judge Chin, we have Professor Peterson, we have Judge Carbon, we have John Laub, and Judge Conley for the Western District of Wisconsin.

They tell me I am supposed to have Judge Chin come first; not because he is from New York, but because you are on the Second Circuit. So you come forward first.

So, please, raise your right hand.

[Whereupon, the witness was duly sworn.]

Senator SCHUMER. Please be seated. You may both introduce

your family and make an opening statement.

Judge CHIN. Thank you, Senator. And thank you, Senator Kohl and Senator Franken, for being here.

Let me start by introducing my family. With me is my wife, Kathy Chin. We have been married 31 years. My oldest son, Paul, is here. He teaches sixth grade math in Newark. He also was a Pegleg. He was in your daughter's class and, indeed, he was on the football team. And you are right, the teams weren't very good.

Senator SCHUMER. When I played at Madison High School, where Senator Coleman attended, Senator Franken's predecessor, our team's motto at Madison was "We may be small, but we're slow."
[Laughter.]

Senator SCHUMER. Which I would not say of the Milwaukee Bucks, since Senator Kohl has some interest in them.

Judge CHIN. Also here is our 15-year-old, Daniel, who will be the star on his basketball team this year. With us also is Paul's friend, Melinda, also from Princeton. And my brother, Daley, is here with his daughter, Alisha.

My deputy clerk, David Tam, who has been my deputy at the court for 15 years, is here, as well. And I've got a whole bunch of law clerks and friends sitting in the back. I want to thank—

Senator SCHUMER. Could all of those who were introduced just please—it is always nice to see the families and friends. So just stand for a second. We are not going to ask you to say anything. Thank you all for being here.

Judge CHIN. Senator Sessions, good afternoon.

I do not have an opening statement, other than to say I thank the President for this honor and I would be pleased to answer any questions.

Senator SCHUMER. Well, before we do that, since Senator Sessions just came in—would you like to make any opening statement, Senator Sessions.

Senator SESSIONS. No. I would just take a moment to say we appreciate this process. It is an important step. Even though members, most of our Committee, are not here today, they have incredible demands upon them. Four of our Republican members are on the Finance Committee and I hear we may have a health care bill in a few hours. I know they are working on that.

But we take it seriously. We look forward to supporting most of the President's nominees and I look forward to this hearing. Thank you, Mr. Chairman.

Senator SCHUMER. Thank you. We will do some brief questions. These are the same questions I asked to Judge Lynch when he was elevated from the District Court to the Second Circuit, and I know he is a colleague of yours.

Judge CHIN. Yes.

Senator SCHUMER. Who was your model of an appellate judge? In your 1994 questionnaire for this Committee, you said "On the proper role of judges, my view is that judges ought not to legislate. That is not their function. Judges interpret and apply the law, keeping in mind the purposes of the law. District judges, in particular, should focus on ensuring that, one, the parties have standing; two, there is an actual case or controversy ripe for judicial review; three, that the law is applied fairly; and, four, that precedents are followed."

Is that still your definition of judicial restraint? Please explain.

So those are my two questions for you.

Judge CHIN. As to the second question, yes. After 15 years of judging, that is still very much my philosophy. I believe in the rule of law and I believe in giving the parties a full and fair opportunity to be heard.

As to the model of an appellate judge, I have great respect for John Newman of our court. He is extremely smart. He's thoughtful. He asks hard questions at oral argument and he's always been a gentleman.

Senator SCHUMER. Thank you. I have no further questions.

Senator SESSIONS.

Senator SESSIONS. Judge Chin, in 2007, in the New York Law Journal, you made a statement that I guess can be defended, but, also, is a statement that raises some concern.

You said this, quote, "If justice is blind, why does the race of a judge matter? Well race does matter. A black plaintiff or a white defendant or an Asian-American litigant who appears before me should not believe that I will rule any differently because of race or ethnicity or cultural background. I won't. But what I will do is bring my diverse background with me. A broader mix of judges at bench which more fairly reflects the rich diversity of our society will improve the overall quality of justice."

So I think there is a little bit of a solid statement in there and a little bit of a statement that makes me a bit uneasy. Would you expound a bit on what you meant in those words?

Judge CHIN. Yes, Senator. In a perfect world, race would be completely irrelevant and, hopefully, someday we will get there. I don't think we're there yet and I think that the quality of justice is not as good if the bench is dominated by one group of the same background or persuasion.

I think with a more diverse group on the bench, the judges will learn from each other. I do not suggest for a moment that an Asian-American judge is more likely to reach a wise result than a white judge, but I think the two together can learn from each other and perhaps come up with a better answer.

Senator SESSIONS. Well, I think the ideal of American justice, would you not agree, and it is the strength of our system, that a judge puts on a robe and that when they do and they take that oath to be impartial, do equal justice to all the parties, that that suggests that they will not let their personal feelings or biases or prejudices, politics or other things interfere with being fair to each party before them; would you agree?

Judge CHIN. I agree, absolutely, with that. Everyone should be treated equally and as I said in that speech, an Asian-American litigant should not be expected to be treated less harshly or more harshly in front of me. But I do think there is something to be gained if the bench reflects the richness of our society.

Senator SESSIONS. Well, I certainly believe that every judgeship should be equally achievable by a person, no matter what their background is, and that they should not be favored, selected groups or races or ethnic groups or religious groups that get favoritism. You enjoined, on one occasion, Judge Chin, the enforcement of provisions of New York's Megan's Law. In the first of the decision,

you held that the notification portion of the statute violated the ex post facto clause of the U.S. Constitution and enjoined it from being applied to inmates who were convicted before the statute was enacted.

The Second Circuit unanimously reversed this decision. On remand, you held that the statute violated the due process clause in its procedures for assigning defendants into risk categories.

Two years after the state and plaintiff reached a settlement, the State of New York amended its Megan's Law. You, again, enjoined the enforcement of the statute. A divided Second Circuit, again, reversed your opinion.

Would you discuss how you approached that case and how you came to be in disagreement with the court on which you would seek to sit and what was it you, on several occasions, overturned the duly passed law of the people of New York?

Judge CHIN. Yes, Senator. There are three aspects to the case and I will take each one at a time. The first was the ex post facto clause. I was not opining on whether Megan's Law was good or bad. I was not looking at the statute as a whole.

I was looking at the narrow question of whether it could be applied retroactively, that is, to people who committed their crimes long before the statute was passed.

It was a thorny issue. I took a good hard look at the precedents and I held that it was punishment that was the technical issue.

The Second Circuit, indeed, reversed and Judge Newman wrote the opinion and Judge Newman wrote that it was a question that was not free from doubt, and the court went that way. I accept the court's decision, of course.

The due process part, I did have due process concerns and, in fact, the parties settled the case and the New York State legislature amended the statute and incorporated measures to address a lot of the concerns that I raised, and, in fact, that was not appealed.

The third part was a narrow contractual position that had to do with whether a new amendment in the law should be applied to those people who were part of the class that was settled originally. And I felt that a contract was a contract and the state should be bound.

The Second Circuit reversed. It was a 2–1 decision. There was a dissent by one of the judges. And the court held that the legislature, in essence, was free to rewrite the contract because it was the state legislature.

Senator SESSIONS. Thank you. Unlike some of the statements some of our colleagues make, I do not think that the U.S. Senate and, I suspect, the New York legislature have always thoroughly studied the constitutionality of what they pass when they pass it and I do not think it is activism that a judge would find a statute that is unconstitutional unconstitutional and if it is unconstitutional, it should not be enforced.

So I will look at your answers, appreciate your answers, and evaluate that. But we have had instances in which judges, for some reason, did not like a law and have gone outside, I think, the normal bounds to see if they can undermine it.

Thank you.

Judge CHIN. Thank you, Senator.

Senator SCHUMER. Thank you, Senator Sessions. Senator Kohl, do you have any questions?

Senator KOHL. Judge Chin, you are moving from the trial court to the appeals court. How do you see the difference between those assignments?

Judge CHIN. Well, first of all, I've loved my 15 years as a trial judge. I love the drama of the courtroom, the hustle and bustle of the day-to-day proceedings. I've been fortunate and I've had a lot of exciting high profile cases.

So it's with some reservation that I would move on, if I am confirmed. On the other hand, after 15 years, I think it is time for a change. If I am confirmed, I look forward to being able to write more, to decide issues a little bit more deliberately, and perhaps to have a broader impact.

Senator KOHL. As you know, you sit on a three-judge panel as differentiated from how you observed and ruled as a trial court judge. In that situation, you need to be in accord with at least one other judge on your panel in order to form an opinion and it requires some degree of ability to convince at least one of the others to support how you think. Is that a challenge that you would embrace?

Judge CHIN. It is a challenge that I would embrace, for sure. In fact, I've sat by designation many times now. Roughly, every 2 years, I've sat on the Second Circuit. In fact, I've issued 10 majority opinions.

And so I understand it's a very different process, because it is—you have to build some consensus. The back-and-forth in terms of the opinions is something I am not used to, because of the independence that we have as trial judges.

Senator KOHL. Thank you. Thank you, Mr. Chairman.

Senator SCHUMER. Now, Senator Feingold has an opening statement first, I guess, and then he may ask questions of this witness, whatever you prefer.

Senator FEINGOLD. I will pass on the questions.

Senator SCHUMER. Thank you, Senator Feingold, for that excellent statement. Now, we will go to Senator Franken for questions of Judge Chin.

Senator FRANKEN. Thank you, Mr. Chairman.

Judge Chin, you are currently presiding over the controversial Google Book search settlement, the possible resolution of which might be one of the important copyright issues or decisions to come before the court in years.

As someone who has presumably thought a lot about intellectual property law and access to information, I would like to ask you about net neutrality. What role do you think courts should play in ensuring both an Internet free from censorship and the prevention of piracy?

Judge CHIN. Thank you, Senator. I would not want to opine generally on what the role of the courts are in this respect.

Our role is to decide cases and if those cases are presented and if those cases are presented to me, and I've had some of them in the past, and if they are presented to me in the future, then I would apply the law.

I would certainly consider the statutes carefully, the text of the statutes, the cases that have interpreted them, the legislative history,

and make a decision based on the law.

Senator FRANKEN. All right. Fair enough, then. I suppose you are not going to tell us how you are going to decide in the Google case.

[Laughter.]

Judge CHIN. That is correct, Senator.

Senator FRANKEN. Those are all the questions I have, Mr. Chairman.

Senator SCHUMER. Well, thank you, Senator Franken. We look forward to your further questions of other witnesses.

Well, thank you, Judge Chin. Congratulations.

Senator SESSIONS.

Senator SESSIONS. Just briefly. You have mentioned that it is difficult sometimes to sentence. Congress has spoken on sentences.

The courts have maneuvered around the guidelines. Even Justice Scalia can make a mistake, I think.

But how would you discuss your philosophy of following the guidelines as a trial judge, where you have to apply them, and what approach has there been—where do you see your role as an appellate judge in that process?

Judge CHIN. Well, in terms of what my role has been, I've done a lot of sentences in 15 years and it is clearly one of the most difficult things, if not the most difficult thing that a trial judge does.

And what I have been doing, certainly, since Booker is to follow the law in that sense.

The guidelines are a starting point. They are an important starting point. They should be given fair and respectful consideration.

And I've found it helpful to have the guidelines as a framework.

It's comforting to know what the judges throughout the country, in their collective wisdom, have decided is a heartland range. But I've also felt it was appropriate to have discretion to go above or below the guideline range in the limited circumstances where that is warranted.

As an appellate judge, I will have to get used to not making that initial decision. It will be a reviewing decision and under Gall, the standard is abuse of discretion and that's the standard that I would apply.

I would hope that—yes, sir.

Senator SESSIONS. That is a pretty low standard for a judge. How would you evaluate your philosophy in actual sentencings compared to your fellow judges being within the guidelines as opposed to without them?

Judge CHIN. Well, in part, it's the process. Did they follow the right process? Did they do a guideline—

Senator SESSIONS. But in the District Court bench where you practiced, do you consider yourself more likely to follow the guidelines than your colleagues or less likely to follow them?

Judge CHIN. I believe there were some statistics done and I was right in the middle of—I was exactly at the average for the court, precisely at the average.

Senator SESSIONS. I cannot complain about that.

Judge CHIN. So a few tenths of a percentage point off. Our court has been criticized as going below guidelines quite a bit, but we have lots of cases with cooperation. And so it's hard to draw any generalizations.

Senator SESSIONS. Well, the matter is a serious one.

Judge CHIN. I agree.

Senator SESSIONS. And I do not think justice will be well served if we abandon a rather strong presumption that sentencing should be within the guidelines.

Thank you, Mr. Chairman.

Senator SCHUMER. Thank you, Senator Sessions. Thank you, Judge Chin. Now, we will call up the second panel.

Judge CHIN. Thank you, Mr. Chairman.

MORGAN CHRISTEN
WEDNESDAY, JULY 13, 2011

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:35 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Christopher A. Coons, presiding.

Present: Senators Coons, Feinstein, Franken, Grassley, and Hatch.

Senator COONS. Good afternoon, everyone. I am pleased to call to order this nominations hearing of the Senate Committee on the Judiciary. I would like to welcome each of the nominees, their families, friends, and supporters to the U.S. Senate and congratulate them on their nominations. I would also like to welcome those of my colleagues who are here to introduce several of the nominees today.

Due to the large number of home State Senators here to give introductions, I will hold off on my opening statement until the introductions are complete. Today we will hear introductions by each nominee's home State Senators from each delegation in order of their seniority. I know that my colleagues' schedules are quite demanding, so please do feel free to leave if you so choose after you have concluded your introductions.

Following opening statements and introductions, each of the nominees will be permitted to give an opening statement, and I encourage them to also recognize their loved ones and supporters when their respective panels are called.

Finally, we welcome Hon. Morgan Christen and Hon. Sharon Gleason. Judge Christen is nominated to be a circuit judge for the Ninth Circuit Court of Appeals, and Judge Gleason is nominated to be a district judge for the District of Alaska. Judge Christen and Judge Gleason will be introduced today by their home State Senators, Senator Murkowski and Senator Begich.

Senator Murkowski, please proceed.

PRESENTATION OF MORGAN CHRISTEN, NOMINEE TO BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT, AND SHARON L. GLEASON, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF ALASKA, BY HON. LISA MURKOWSKI, A U.S. SENATOR FROM THE STATE OF ALASKA

Senator MURKOWSKI. Thank you, Mr. Chairman. It is not very often that I get to come to the Judiciary Committee to introduce Alaskans to you, so today is a special treat. As Senator Carper said, it is a special day for Delaware as he made the introduction. It is not only special for Alaskans. Today is a historic day for us in Alaska.

We are a very young State. We are just a little over 50 years old as a State, and since Alaska was admitted as a State, only two Alaskans have served on the Ninth Circuit: Robert Boochever, who was appointed by President Carter back in 1980; and then Andrew Kleinfeld, appointed by President Bush in 1991. Both of these individuals are currently on senior status.

The President has nominated Justice Christen to succeed Judge

Kleinfeld on the Ninth Circuit. Further, only ten individuals have served on the U.S. District Court for Alaska. None of those individuals on either court have been women. So while it is historic whenever a vacancy arises on either court, today's hearing is especially historic because, if confirmed, Morgan Christen and Sharon Gleason will be the first two Alaska women to serve on the Federal bench.

As a member of the Alaska Bar and as the senior Senator from Alaska, let me say that the President could not have nominated two more qualified individuals to fill these seats. And in saying that, I speak not only for myself but for also a broad segment of those who are involved in the justice system in Alaska. Both Justice Christen and Judge Gleason are products of the Alaska court system and won their positions through a merit selection process. That merit selection process was created by the Alaska Constitution. It was intended really to keep politics out of the judicial selection process. And we are very proud of that system.

Before an individual may serve on an Alaska court, he or she is broadly vetted by the Alaska Judicial Council, which is a nonpartisan and independent body consisting of citizen and attorney members. Every candidate is formally evaluated on issues like integrity, professional competence, fairness, judicial temperament, and suitability of experience. I think if you were to ask any Alaskan attorney about the rigor of this process, I think you would get pretty much the same answer. The grading is tough, and for those who are not up to the challenge, they are told no in no uncertain terms. But both Justice Christen and Judge Gleason have survived this selection process, and I think survived it most admirably. I should point out that Justice Christen has survived this process now twice. Once before, she was appointed to the superior court by Democratic Governor Tony Knowles and again before, she was appointed to the Alaska Supreme Court by Republican Governor Sarah Palin. Now, if that does not speak itself to Justice Christen's exceptional integrity and competence for a judicial role, I would also point out to you that Justice Christen received the highest score of all candidates for the Supreme Court seat within that vetting process.

Under Alaska's system, State judges must stand for periodic retention elections. Prior to those elections, they are vetted once again by the Judicial Council through polls of peace and probation officers, jurors, social workers, fellow judges, and practicing attorneys. This information then provides the Judicial Council with an evidentiary basis to make a recommendation to the public on whether or not the judge should be retained.

I would note that Justice Christen and Judge Gleason have both participated in this very rigorous retention process, and each has been returned to the bench by the voters with an affirmative recommendation of the Judicial Council.

I have known Justice Christen for almost 25 years now. We graduated from law school just about the same time. We both clerked for the Alaska State court system at just about the same time. We have kept in touch over the years, and I have come to know her husband, Jim, and her family. I have appreciated that Justice Christen has been mindful of the separation of powers throughout

her judicial career and mindful of the fact that her personal views have no bearing when it is time to determine what the rule of law is. And I know that we can expect her to continue in that vein when she moves to the Federal bench.

In 2009, when Morgan Christen was elevated to the Alaska Supreme Court, Judge Gleason was appointed to become the presiding judge of the Third Judicial District.

Like Justice Christen, Judge Gleason is exceptionally well qualified to serve, and I strongly support her nomination.

I appreciate the opportunity again to speak to the Committee on behalf of two exceptional—exceptional—judges from the State of Alaska and would encourage confirmation through the process.

Thank you.

Senator COONS. Thank you very much, Senator Murkowski.

Senator Begich.

PRESENTATION OF MORGAN CHRISTEN, NOMINEE TO BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT, AND SHARON L. GLEASON, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF ALASKA, BY HON. MARK BEGICH, A U.S. SENATOR FROM THE STATE OF ALASKA

Senator BEGICH. Thank you very much, Chairman Coons, Committee members. Thank you for the opportunity to join Senator Murkowski in introducing two of Alaska's finest judges who have been nominated for Federal appointments. I know both of these candidates quite well, have worked with them for years, and recommended both to President Obama for the positions he has nominated them for.

Let me start with Judge Christen. Morgan and I have known each other for more than a decade. I worked with her in her capacity as a judge and as a member of nonprofit boards. When I was elected mayor of Anchorage in 2003, she was the presiding judge for Alaska's Third Judicial District. It is there we worked especially closely together on a task force that I created to address gangs in south-central Alaska, our State's largest population center.

We also worked together to better coordinate the technology used by the municipality of Anchorage, the Anchorage Police Department, and the State of Alaska court system. From that work I can say without reservation that Judge Christen is a person of great integrity, ability, and compassion. She has built an excellent reputation in Alaska's legal circles for fairness, thoroughness, and sound professional judgment.

Alaska's judicial system is set up to be nonpartisan, and Morgan certainly is. Her fellow lawyers have given her the highest marks over the years, and she has the support of the Alaska public through her retention elections. To her credit, she is deeply committed to public service. As a lifelong Alaskan, I also appreciate that Judge Christen has traveled extensively in our State and knows its diversity. I am confident that Morgan will be an excellent judge on the Ninth Circuit Court of Appeals.

After Judge Christen was nominated to the Alaska Supreme Court, Judge Gleason was appointed to become the presiding judge of the Third Judicial District.

Mr. Chairman and Committee members, my only regret—and I know Senator Murkowski's regret, too—with recommending these

two outstanding Alaskans is that Alaska's State courts will lose two of their finest when these two outstanding judges move to the Federal bench. But our Federal judiciary and our country will be much better off.

Thank you again for this opportunity to introduce two fine Alaskan judges.

Senator COONS. Thank you very much, Senators Murkowski and Begich. From your description it sounds as if Alaska has a remarkably thorough, nonpartisan, and effective means of selecting qualified and talented judges. As someone who had the honor of clerking for Judge Jane Roth on the Third Circuit, who also just happened to be the first woman on the Federal bench in Delaware and an incredible, outstanding judicial contributor to Delaware's legal culture for a generation, I am grateful to hear your introductions of the two outstanding nominees from Alaska. Thank you very much for joining us today.

I will now move, if I can, to a brief opening statement to be followed by Senator Hatch, and then we will proceed to our first panel, if we might.

STATEMENT OF HON. CHRISTOPHER A. COONS, A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator COONS. I am pleased to be here once again. I am pleased to be joined by Senator Hatch at our nominations hearing. I am especially pleased our Committee has Richard Andrews before us today, nominated to sit on the Federal trial court in my home State of Delaware, and I thank both Chairman Leahy and Senator Grassley for their cooperation in allowing this Committee to hear Rich Andrews' nomination today.

Nomination hearings are important. The positions to which all of our nominees today are seeking confirmation carry with them life⁶⁵⁰ time tenure. It is in my view important the Senate takes seriously its role to examine the qualifications, work ethic, and intelligence of our nominees. We serve as the final gatekeeper, and it is our role to ensure the Federal judiciary is staffed with capable, honest, and hard-working judges.

Another qualification we must examine in nominees is their temperament, for not every great attorney is appropriate to be a great judge. Great judging requires modesty and respect for the role that judges play in our system as arbiters of facts and the law rather than makers of policy. Judging also requires a certain degree of selflessness. Each of these candidates could no doubt make a much better living in another line of work, yet they choose to forgo a larger paycheck for their families in order to serve the broader public interest. Finally, in my view being a great judge requires some balance of empathy and evenhandedness—empathy to understand the situations and motivations of litigants who come before them, and evenhandedness to apply the law fairly and independently, regardless of any personal concerns of the outcome.

Just as serious as our obligations to scrutinize the nominations closely, however, is our obligation to consider the President's nominees expeditiously. It goes without saying judges are essential to our judiciary. Just as they seek a non-political office, we in this body ought not in my view play politics, to the extent possible, with nominations. There are 15 judicial nominees sitting on the executive

calendar who were reported out of this Committee without dissent. Some have been awaiting action for 3 months, an unfortunate and difficult period of time. Candidates should be scrutinized and, when the conscience of a member demands it, even opposed. But where candidates have been scrutinized and no objection raised, I believe we owe it to them and the American people to act swiftly. Because of the failure to reach some consensus on their consideration, litigants throughout this country, from Maine to New York, Missouri to Colorado, are receiving today slower and less justice in my view than they deserve. So the nominees before us today, it is my hope you will find this process fair and substantive. I can promise personally that I will consider your nominations on their merits and hope you will receive similarly fair and open treatment from all of my colleagues.

Senator Hatch.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Well, thank you, Mr. Chairman. I am pleased to support the Ranking Member, Senator Grassley, to participate with you in today's hearing.

I note that the current total of 90 judicial vacancies across the country is 10 percent below what it was at this time last year. Now, this is the tenth judicial confirmation hearing so far this year, and these hearings have included a total of 42 judicial nominees—the busiest schedule during the comparable period under the last several Presidents, by the way.

The 24 district court nominees confirmed so far this year is the highest total during the comparable period under any President in American history.

I mention these facts only to say that while there are some real substantive differences about a handful of controversial nominees, I think we are making solid confirmation progress. I know that the Ranking Member and all Senators on our side are committed to making progress.

Mr. Chairman, we have before us today several nominees to the Federal district and appellate courts.

I just want to welcome all of you nominees as well as your families and friends to the Judiciary Committee. I look forward to hearing from you, and we will proceed from that.

Thanks, Mr. Chairman.

Senator COONS. Thank you, Senator Hatch, and I agree with you that we are blessed to have a working partnership that is allowing us to continue to move forward with nominees. I just hope we will continue to sustain the current pace.

Now I would like to ask Justice Christen to step forward and remain standing. Please, if you would, raise your right hand and repeat after me. Do you solemnly swear that the testimony you are about to give to this Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Justice CHRISTEN. I do.

Senator COONS. Please be seated. Thank you. Let the record show the nominee has taken the oath.

Now, Justice Christen, I would welcome you to acknowledge any family members or friends you may have with you here today and

give an opening statement to the Committee. Thank you.

STATEMENT OF MORGAN CHRISTEN, NOMINEE TO BE
CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Justice CHRISTEN. Thank you, Senator. I am going to take you up on your offer to introduce my family, but that requires a list so that I do not forget any of them, or I would be in big trouble.

My husband, Jim Torgerson, is here, and my daughter, Erin Torgerson, and June Smith; and that is my Alaskan family.

My sister, Betty Thompson, and niece, Christen, and nephew, Max, are here from North Carolina.

Pat Christen, my sister, and Rene Durazzo, my brother-in-law, are here from the San Francisco Bay Area, with two more nieces—Morgan and Madison. And our two brothers are not here, Michael and Bob, but they will be watching.

Our parents will be watching from Washington State, and I have in-laws and a lot of extended family watching from northern Minnesota.

Thank you, Senator. I do not have an opening statement, Senator.

I know you all are very busy. I just want to thank you very much for this hearing, and, of course, I would like to thank the President for nominating me.

Senator COONS. Thank you, Justice. Then my inclination is to begin with 5-minute rounds and for us to proceed with questioning.

Justice Christen, could you begin by describing your judicial philosophy for us?

Justice CHRISTEN. Sure. Senator, I really believe that my job is all about public service, and the way my branch serves the public is to decide cases according to the rule of law, not according to how we would like the law to be or according to our personal views. I believe that we have an absolute obligation to provide a fair, impartial forum for litigants, to always be mindful of the separation of powers and the importance of judicial restraint. And I would say also that I think it is always incumbent upon judicial officers to make sure that they set the tone so that all litigants are always treated with courtesy and respect.

Senator COONS. You mentioned judicial restraint. Can you give us an example or two of cases where you were called upon to exercise judicial restraint and talk to us about how challenging or uplifting that might have and what the outcome was?

Justice CHRISTEN. Sure. When I talk about judicial restraint, I am speaking of the need to decide just the case or controversy before the court and nothing more. We are human beings, of course, but we are called upon to review the facts and review the law and rule just on the controversy that is before us.

One example of that might be *Brown v. LDG*, which is a case that I decided when I was a superior court judge. The case involved a woman who was killed, and she left a couple of young sons behind. There had been a lot of controversy in Alaska over the tort reform statute in our State. I think that is true in many States.

We were no exception. But the question before me in that case was not about the pros and cons of tort reform. The question was really whether the legislature's cap on non-economic damages was constitutional. That was the issue. And in my judgment it was, and I upheld that statute. That might be an example that would speak to your question.

Senator COONS. In your view, Justice, how would your job as a judge of an intermediate appellate court differ from your previous experience as a trial court and differ from being a Supreme Court Justice? And how would the skills that you have developed in your various roles—excuse me, on different State benches, translate to your responsibilities as a Ninth Circuit judge?

Justice CHRISTEN. Well, I certainly think there are some different substantive areas, Senator. There is no question that there are different substantive areas. The work that I did on the trial court I think will be invaluable to me because, as an appellate court judge, I know what it takes to create that record and I know how to find things in the record. And that has been incredibly valuable to me as I made the transition from the trial court to the State Supreme Court.

I now have a full-time docket, of course, of appellate court work, and that in and of itself is a big transition because, of course, there are different standards of review and it is an entirely different analysis in that sense. We do not re-try the facts, certainly. And I have also made the transition from being a single-judge court to being one of five on a multi-judge court, which is another very significant difference.

I think one of the challenges will be that the Ninth Circuit is enormous and there is a lot of travel time involved and I think will have to work very hard to know my colleagues because I think it is terribly important to have collegial relationships with all colleagues, not just because that is nice—but it is—but because I believe that courts function better and the work product is better if we know each other well. There is more tugging, pushing and pulling on those decisions, and we give each other more leeway to do that and generate a better work product if we know each other. And I think that is something we would have to work at given that there are so few judges over such a vast distance.

I hope that is not a sign.

[Laughter.]

Senator COONS. I think there was a thunderstorm outside.

Justice CHRISTEN. OK. All right.

Senator COONS. Maybe it was a resolution of the debt ceiling, Who knows?

[Laughter.]

Senator COONS. As a circuit court judge—last question from me—how would you see your role in ensuring fair access to the courts and to justice? It is a quite different role than a State judge, but I think all of us who have any connection with the justice system still need to have some concerns about access. How would you see your role as a Ninth Circuit judge?

Justice CHRISTEN. Well, I am always a little suspicious of people who have not served on a court giving advice to that court about how it ought to be done. So the first thing I would like to say—I am going to answer your question, of course, but the first thing I would like to say is I would first want to hear from the professional staff and the judges on the Ninth Circuit because I know they have worked at this very hard already.

My experience in the trial court might go to your question because Alaska, of course, is huge and there are only 700,000 people

sprinkled throughout that State. And so we work very hard on access to justice, everything from our computer systems so that folks who cannot get to the courthouse because there literally is not a road—maybe it is only accessible by snow machine or boat or airplane—so that those people can participate by getting the court forms and getting them filed that way. And we have done a lot of work on television cameras in the courtroom on the Alaska Supreme Court. Almost all of our hearings are televised so that folks can participate or certainly have access to our hearings that way. Senator COONS. Thank you, Justice.

Senator Hatch.

Senator HATCH. Thank you, Mr. Chairman.

Justice Christen, welcome to the Judiciary Committee.

Justice CHRISTEN. Thank you.

Senator HATCH. Now, my main focus in evaluating judicial nominees—I will try and get a little closer here—is whether they are qualified by legal experience as well as their judicial philosophy. Those are the two big areas that I currently feel are the most important. Now, you currently serve on a State appellate court which follows common law, but you have been nominated to a Federal appellate court which uses written law.

Now, we have seen many needs take that path, but in my opinion, they do not always make the transition to what I believe is a more defined, limited judicial role in the Federal court system. What do you see is the difference? Do Federal judges have as much discretion, as much power, when interpreting statutes or the Constitution as State judges have in developing and applying common law?

Justice CHRISTEN. Well, thank you, Senator. For the first 7 years when I was on the bench, of course, I was a superior court judge, and I was bound by precedent as well, bound by the Alaska State court precedent, and certainly bound by the statutes the legislature had given to us. Whether I have been called upon to apply statutes or regulations or have been required to very closely read our case law and follow that precedent, I think I have been very faithful about ruling according to the rule of law.

Senator HATCH. OK. In one of your opinions on the Alaskan Supreme Court, *Allstate Insurance Company v. Dooley*, you created a new cause of action for what you called “fraudulent concealment of evidence.”

Now, versus Federal statutes, various Federal statutes create duties, but not all create private causes of action. Now, Federal judges are sometimes invited to create what Congress does not by simply saying that a cause of action is implied.

What approach are you going to use—or let us put it this way: What approach should a Federal judge take when asked to interpret a statute so as to create an implied private cause of action?

Justice CHRISTEN. A Federal judge, like a State court judge, should always interpret the law faithfully according to the law that we are given by the legislative branch. When a statute is unambiguous, Senator, my job is to apply it currently in the job that I have now, and it certainly would be if I am fortunate enough to be confirmed.

Senator HATCH. Well, according to the Constitution as well as written statute.

Now, President Obama has said that judges should base their rulings on “one’s deepest values, one’s core concerns, one’s broader perspectives on how the world works, and the depth and breadth of one’s empathy.” Do you agree with that?

Justice CHRISTEN. I believe that judges have an obligation to rule based on the rule of law, and that is what I have done for 9 1/2 years. I think I have that track record, Senator.

I do not think that empathy plays any role in determining what the rule of law is or in how we apply the rule of law. We are not allowed to tilt the scales depending on how we feel about a case. But I believe that there are life lessons that we have all learned that are very important that judges retain and take with them to the bench. By that I mean that I think it is very important that we are always mindful that there are real people on the receiving end of our orders, and very often there are people’s lives on hold or their businesses are on hold waiting for our decisions. That is why it matters very much that our work is timely, for example.

Senator HATCH. Federal judges interpret and apply written law to decide cases. Now, interpreting the Constitution or statutes requires determining what their words mean.

Justice CHRISTEN. Yes.

Senator HATCH. A more restrained or limited approach says that the only legitimate meaning is already provided by those who made the Constitution law—in other words, its original meaning. A more activist or flexible approach says that judges may give new meaning to the Constitution that they find from various sources. Some judges focus on the text. Others focus on purposes and consequences that they really want to achieve.

Now, could you tell us your view? I do not mean to pigeonhole or label you, but I do want to understand more about your approach to judging. Which approach is more consistent with what you believe is the power and proper role of Federal judges?

Justice CHRISTEN. Thank you. What I have learned is that people, even judges, mean a really different thing by those phrases and terms, Senator, and so I try to avoid using them. For example, I do not use the phrase “living, breathing.” I think that is subject to a lot of misinterpretation. I think a lot of members of the public, for example, hear that and they think we mean that we can—that any judge can change the words that are in the Constitution. And we clearly cannot do that. It is not permitted. There are other phrases, “calling balls and strikes” and so forth, and I try to avoid them.

What I do, what I have done for the last 9 1/2 years, when I am, for example, called upon to look at a constitutional question, is always start with the language of the Constitution. I believe absolutely that those words are enduring. They have guided us for over 200 years. It is not the job or within the range of my duties or my power to change those words. We always start—I always start with the language of the Constitution, and then I look at binding authority.

I have faithfully applied binding authority, Senator, and if I am fortunate enough to be confirmed, I will continue to do so.

Senator HATCH. Well, thank you.

Justice CHRISTEN. Certainly.

Senator HATCH. My time is up, Mr. Chairman. I appreciate it.

Senator COONS. Thank you, Senator Hatch.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

Justice Christen, I noticed you said you had some family viewing from northern Minnesota.

Justice CHRISTEN. A few dozen.

[Laughter.]

Senator FRANKEN. OK. And where in northern Minnesota would that be? Would they be all over northern Minnesota or located in one specific area?

Justice CHRISTEN. The closest place that has a dot on the map that you might be familiar with is probably Bemidji.

Senator FRANKEN. Oh, OK. Well, you know Senator Begich has family on the Iron Range. Well, I guess you did not know that.

[Laughter.]

Senator FRANKEN. I guess he did not prepare you.

Justice CHRISTEN. Are you going to tell him?

[Laughter.]

Senator FRANKEN. Yes. I have just told you.

Justice CHRISTEN. OK. Thank you.

Senator FRANKEN. Well, anyway, hello to all your family. They should be very proud.

Justice CHRISTEN. Thank you.

Senator FRANKEN. I noticed that while you were in private practice, you represented the State of Alaska in litigation that followed the Exxon Valdez oil spill. Can you tell us about that litigation and what you learned from it?

Justice CHRISTEN. What I learned from that litigation was what it is like to work on a very large litigation team with many different moving parts. That is for sure.

My particular part was small. There were just a few of us working on the liability portion of the case for the State of Alaska. That is where I fit in. And to be very specific, my job in the early years of that case—because it did extend for many years, but for the first couple of years, my job was focused on compiling the most accurate record I could of the timeline of events, 24 hours before the grounding of the tanker and 24 hours after the grounding of the tanker.

I also worked on the—because I was part of the litigation team, I worked on the summary judgment motion, which established liability.

Senator FRANKEN. OK. And leading up to that, there was some drinking involved, was there?

Justice CHRISTEN. Not by the litigation team.

[Laughter.]

Senator FRANKEN. I will do the jokes.

[Laughter.]

Senator HATCH. I kind of like yours better.

Senator FRANKEN. I am afraid you lost a vote.

[Laughter.]

Senator HATCH. Well, let me retract that.

Justice CHRISTEN. Thank you, Senator Hatch.

Senator FRANKEN. I have empathy so I will vote for you.

Speaking of which, I noticed that—because this is interesting, because on this empathy question, which we hear over and over and over again, and I agree that you have to decide on the law and

that—certainly the way you feel, but I noticed that you said that you have to apply certain life lessons, and so you answered—to me, you answered with a little nuance, which actually I find a little refreshing because I think empathy sometimes is confused with sympathy.

Justice CHRISTEN. Yes.

Senator FRANKEN. And empathy simply means understanding human beings. And I think that the experience of a judge is whether—no matter how the judge factors, tries to factor that out, the experience of a judge has something to do with how they are a judge. Do you agree or not?

Justice CHRISTEN. The experience of a judge has something to do with how they—

Senator FRANKEN. The life experience cannot help but have—I mean, otherwise, we just have judges that were like in a bubble. That would be the ideal way to raise a judge, although then they would have to recuse themselves on cases that involve people who lived in bubbles.

[Laughter.]

Justice CHRISTEN. And your question is?

Senator FRANKEN. Could you comment on that?

[Laughter.]

Justice CHRISTEN. I can try.

I agree with you that people sometimes confuse empathy with sympathy, and there is an important distinction to be made there, Senator. I meant what I said when I talked about interpreting the rule of law, and we do not get to tilt that scale based upon how we feel. But we are not robots, and in our system in our country, we do not leave judging to an Excel spreadsheet or to robots, certainly. I also meant what I said about believing very firmly that it is so important—and I trained judges in the trial court—that those life lessons mean a lot. Absolutely we need to always remember who is on the receiving end of those orders. It matters very much for some of the reasons that I mentioned earlier.

Senator FRANKEN. Well, thank you. You seem eminently qualified, and everyone in your family should be very proud of you.

Justice CHRISTEN. Thank you.

Senator FRANKEN. And thank you very much.

Thank you, Mr. Chairman.

Senator COONS. Thank you, Senator Franken.

Are there any further questions by members of today's panel?

Senator HATCH. No, sir.

I intend to support you, so I will follow up on that.

Justice CHRISTEN. Thank you.

Senator COONS. If there are no further questions, I will hold the record open for a week for members of the Committee who may not have been able to join us due to their schedules but may wish to submit questions. And, again, Justice, I want to particularly thank you and your whole family for joining us here today. I congratulate you on your nomination and wish you all the best. I am confident that you will serve admirably and thoughtfully as a member of the Ninth Circuit, and, Justice Christen, as you and your friends and family are departing, I would like to invite the next panel to come forward and join us.

Justice CHRISTEN. Thank you, Senator.

Senator COONS. Thank you very much, Justice Christen.

ANDRE DAVIS

WEDNESDAY, APRIL 29, 2009

U.S. SENATE,

COMMITTEE ON THE JUDICIARY,

Washington, DC.

The Committee met, pursuant to notice, at 2 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Benjamin L. Cardin, presiding.

Present: Senators Cardin, Feingold, Schumer, Durbin, Whitehouse, Kaufman, and Coburn.

OPENING STATEMENT OF HON. BENJAMIN L. CARDIN, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator CARDIN. The Senate Judiciary Committee will come to order. Let me welcome everyone here today. I particularly want to welcome our three nominees and their families and thank each of them for their public service and their continued desire to serve the public, and thank their families for the sacrifices that they make in order that their spouses can serve in public life.

I want to thank Chairman Leahy for allowing me to chair the hearing. It is my understanding that Senator Coburn will act as the Ranking Member at today's hearing and that he is on his way to the Committee and has told me through staff that we should get started. So in order to keep to the schedule, not too clear as to when the next votes will be on the floor of the Senate, we will start today's hearing.

I just want first, to Judge Hamilton, I hope you will allow me, with just a little bit of Maryland pride, talk about today's hearing.

We are very proud of the connection that our two nominees have to the State of Maryland. Judge Andre Davis is well known in Maryland. He is a graduate of the University of Maryland School of Law that you will hear frequently mentioned today. He is a former professor at the University of Maryland School of Law.

I am a graduate of the University of Maryland School of Law. Senator Mikulski is a graduate of the University of Maryland at Baltimore School of Social work. And Senator Sarbanes in his career in the U.S. Senate was a strong proponent of the University of Maryland School of Law.

[Laughter.]

Senator CARDIN. So it is with pride that we have this hearing today for three nominees, two for positions on the circuit court of appeals, and one to head up the Assistant Attorney General for the Civil Rights Division, all three extremely important positions.

So I welcome David Hamilton, Judge Hamilton. I welcome Judge Andre Davis and Tom Perez, and I look forward to this hearing today and look forward to your service in the positions that you have been nominated to by President Obama.

Judge Andre Davis, if I were not chairing today's hearing, I would be sitting next to my senior Senator, Senator Mikulski, in introducing and supporting Judge Davis' nomination for the court of appeals. I think he is eminently qualified. His experience—and let me just comment briefly about his experience for this position. He is a former Assistant U.S. Attorney. He has the experience in the judiciary which is unique. He started on the District Court of

Maryland, which is our judicial level that you have the most contact with the people, and he did an outstanding job on the district court in our State, serving there for 3 years before moving on to be a circuit court judge in Baltimore City. Again, that is our trial court level. He served with great distinction and then was appointed to the United States District Court, where he has been a judge since 1995.

He is praised by lawyers as being smart, evenhanded, fair, and open-minded in the manner in which he conducts his court. He has been rated by the ABA rating as well qualified. He has been a professor, as I pointed out before, and a mentor to many young attorneys. One in particular I would like to mention who is my counsel to the Judiciary Committee, Bill Van Horne, clerked for Judge Davis.

His roots are deep in Maryland, which is something that we find a great advantage. This seat is a Maryland seat. Judge Davis was born in Baltimore, raised in Baltimore, and lives in Baltimore. He is active in the Maryland community in his entire life, and the history of this vacancy is Judge Francis Murnaghan, who died in August of 2000. The seat has been open. I think this is a most appropriate replacement. Judge Davis clerked for Judge Murnaghan.

At this point I am going to turn first to the senior Senator from Maryland, Senator Mikulski, and then it is always a pleasure to have back Senator Paul Sarbanes. I am honored to be labeled "holding the Paul Sarbanes seat in the U.S. Senate."

Senator Mikulski.

PRESENTATION OF ANDRE M. DAVIS, NOMINEE TO BE CIRCUIT JUDGE FOR THE FOURTH CIRCUIT, AND THOMAS E. PEREZ, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE, BY HON. BARBARA MIKULSKI, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator MIKULSKI. Thank you very much, Mr. Chairman. This is indeed an exciting day for Maryland. We will be able to introduce a distinguished jurist from Maryland being called to serve our country, Judge Andre Davis, from our home town of Baltimore, who has been nominated to the Fourth Circuit Court of Appeals, and Secretary Tom Perez, who is playing a leadership role now in the O'Malley administration and we hope will be playing a leadership role in the Obama administration to head up the Department of Justice's Civil Rights Division.

I really want to thank Senator Leahy for being so prompt in scheduling these hearings and also to allowing us to testify today. And it is great seeing you in the chair. You look like you belong there.

So we would hope that the Davis hearing would be able to be completed today.

Mr. Chairman, I take nominating judges very seriously, and I have four basic criteria: one, they have to be people of absolute integrity; they have to have judicial competence, judicial temperament, a commitment to core constitutional principles, and a history of civic engagement in Maryland. This is why we believe that Judge Andre Davis will be an outstanding nominee. I am honored to introduce him today, and he has with him his family, who I am

sure he will introduce to the Committee. But he brings great integrity, a keen intellect, sound judicial experience and temperament.

He was also nominated for this position by President Clinton. At the time of his nomination nearly a decade ago, he received the highest of the ABA ratings, and today as he comes before you, know that he has been an outstanding judge, and he brings a compelling personal story. He comes from a family of modest means.

His father was a teacher, his stepfather a steelworker. His mother worked in food service. He grew up in our neighborhood of East Baltimore, a community that valued hard work and a community that valued service.

He earned a scholarship to Phillips Andover Academy and was one of four African Americans in a school of 800 students. And even as a young man, he knew that with opportunity comes responsibility.

During those days at Andover, he volunteered at a juvenile detention facility and mentored juveniles on Saturdays. He went on to earn his B.A. at the University of Pennsylvania and graduated from the University of Maryland Law School where he won the Best Advocate Award in the moot court competition. The law faculty awarded him the prestigious Roger Howell Award at graduation.

He then went on to work as a lawyer in public housing and to also work in a variety of other positions.

Judge Davis is known for having outstanding competence. As I said, when President Clinton nominated him, the ABA gave him the highest rating. I note for the Chairman that I have here a letter from the Maryland Bar Association highly recommending Judge Davis, and I ask unanimous consent that the Maryland Bar Association letter be included as part of the record.

Senator CARDIN. Without objection, it will be included in the record.

Senator MIKULSKI. He has been known as a judge to handle difficult situations. He brings thoughtful temperament, is well respected among his colleagues, and has served as a distinguished judge and also served as a prosecutor. He worked in the U.S. Attorney's Office and the Civil Rights Division. He also brings a history of integrity, a strong work ethic, and a commitment to public service. He is an independent thinker and is dedicated to the rule of law.

Well respected by his colleagues, he received the Benjamin L. Cardin Award of Public Service, as you noted, named in your honor, that was meant to be someone who would have an unassailable record in the community as a lawyer and a judge.

In addition to all of the things that would make him a great judge—intellect, integrity, competence—there is that sense that a judge has to be wise. And we believe that people are wise when they are also civically engaged.

Judge Davis has repeatedly in his career been an outstanding participant in the community, whether he has tutored juveniles, whether he has been on the board of the Urban League, whether he has worked as President of the Big Brothers and Sisters of Central Maryland serving on that board, also working with other organizations on prison re-entry, prison education reform, and also community entrepreneurship. He brings, I believe, every characteristic that a smart judge but a wise judge and an honest judge would do.

And I would hope that the Committee would expeditiously approve him and move him to the Senate for deliberation.

Mr. Chairman, I would be happy to answer those questions, but in a thumbnail, I think we are really proud of our nominees today, and we would hope they would be given quick and expeditious approval. Senator CARDIN. I thank Senator Mikulski.

Senator Sarbanes.

PRESENTATION OF ANDRE M. DAVIS, NOMINEE TO BE CIRCUIT JUDGE FOR THE FOURTH CIRCUIT, BY HON. PAUL S. SARBANES, A FORMER U.S. SENATOR FROM THE STATE OF MARYLAND

Senator SARBANES. Mr. Chairman, Senator Coburn, thank you very much for giving me the courtesy of appearing before the Committee today.

I came primarily to talk about Judge Davis, and I will outline why in just a moment.

With respect to Judge Davis, let me tell you how pleased I am to come on his behalf here today. Senator Mikulski and I had the privilege of recommending his nomination some years ago to this Fourth Circuit seat. He was nominated, but the nomination came late in the day of that administration, and it was not acted upon. And we are pleased that he is back before the Committee here today.

He reflects something that is important to us. Senator Mikulski outlined it in the standards she set out. Maryland has had a great tradition since the early—even before the early days of the Republic—in colonial times, of having a very distinguished bar. Maryland lawyers and judges have really ranked at the very top of the workings of our political system, and we are proud of that in our State, and I think deservedly so.

Andre Davis is a Maryland product, simply put. He was born in Baltimore, raised in Baltimore, went to the University of Pennsylvania, came back to the University of Maryland Law School, where he had a very distinguished academic career. He clerked for Judge Frank Kaufman in the United States District Court in Maryland, and then the following year he clerked for Judge Francis Murnaghan on the Court of Appeals for the Fourth Circuit—the very position for which he is seeking confirmation here today.

He then worked for the Civil Rights Division of the U.S. Department of Justice. He joined the U.S. Attorney's Office in Baltimore.

He taught at the University of Maryland Law School and in 1987 was appointed to the district court in Baltimore. In 1990, he was moved up to the circuit court, the trial court of general jurisdiction, and served there until 1995, when he was appointed to the Federal district court. He has been on the Federal bench now—it will be 14 years this coming August. So this is a distinguished jurist, and he has a prior record that people can evaluate, I think an outstanding record, at the State trial level and then at the Federal trial level.

He has been very active in our community, something I think which is of importance. Judges, I think, in addition to the outstanding performance we expect from them on the bench, I hope would be people of stature in the community who would serve the broader community in a leadership role. And Judge Davis has been

Director of the Baltimore Urban League; he has been President of the Legal Aid Bureau, a trustee of Goucher College. He has been a driving force in the Big Brothers and Big Sisters of Maryland. He has been President and Vice President of the Executive Committee of the Maryland Judicial Conference. He has been a member of the board and President of the University of Maryland School of Law Alumni Association, and highly, highly respected in his performance on the bench.

The Committee, I understand, has before it a letter that has come from many, many of the former Murnaghan clerks, those men and women who had the honor to clerk for Judge Murnaghan. I am sensitive to that because Judge Murnaghan was a mentor of mine in private practice many, many years ago, and a person of just extraordinary commitment and distinction.

In that letter, the Murnaghan clerks say, and I quote them, "Judge Murnaghan showed us how important it is for a wide range of cases to be addressed by a person of powerful intellect, deep learning, intuitive sympathy for all, and a steely commitment that judges should unflinchingly see that fairness prevails. Andre Davis will be unflinching in that duty." And they go on in their conclusion to say, "Judge Davis' life and career fully express the ideals and sense of duty that Judge Murnaghan so magnificently embodied." I could not agree with an evaluation more than I agree with this one by all of these former Murnaghan clerks. Judge Davis will be a superb addition to the Federal bench. I clerked in that court my first year out of law school for Judge Morris Soper, and I have always been sensitive since to the necessity of having excellence on the Federal bench. Judge Davis reflects that excellence, and I very much hope the Committee will act positively and expeditiously on his nomination.

Thank you very much.

Senator CARDIN. Senator Sarbanes, I want to thank you for being here and speaking in regards to these nominees. I know it is very helpful to our Committee, your observations, and we thank you for returning. And, Senator Mikulski, it is always nice to have you in our presence on the Judiciary Committee any time you want to.

Senator Coburn.

STATEMENT OF HON. TOM COBURN, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator COBURN. First of all, Senator Sarbanes, great to see you again. Thank you.

Senator SARBANES. Thank you, Tom.

Senator COBURN. Senator Mikulski, thank you both for your input. I understand that you are taking both the Ranking and the Chairmanship in my absence, and I apologize for being late. I also would apologize for other members of our Caucus. I think I had three hearings scheduled at 2 o'clock as well, so I would announce ahead of time I have another one at 3:00, so I will be leaving, and will be submitting a large number of questions for the record.

I appreciate your recommendations. They mean a lot. I think one of the things we do want to do is we want to make sure President Obama gets qualified judges and the ones he selects. That is his right. But I also think we ought to have the due diligence and the time to explore the areas that we might want to know. And so we

will be expeditious but also thorough, and we will try to work with the majority to make sure that happens.

Thank you for your testimony.

Senator CARDIN. Thank you, Senator Coburn.

Thank you.

Senator SARBANES. Thank you.

Senator CARDIN. We will now invite the three nominees to come forward. And if Judge Davis and Judge Hamilton and Secretary Perez will remain standing for one moment. Thank you. And if you would raise your right hand and repeat after me. Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth?

Judge DAVIS. I do.

Senator CARDIN. Thank you. Please have a seat.

We will start with Judge Davis, and it is the tradition of our Committee, we want to make sure that you maintain a good relationship at home, so if you would introduce your families, that would be helpful, I think, to us and to you.

STATEMENT OF ANDRE M. DAVIS, NOMINEE TO BE CIRCUIT JUDGE FOR THE FOURTH CIRCUIT

Judge DAVIS. Thank you very much, Senator. Let me say, if I might, how honored I am to have Senator Sarbanes here to speak on my behalf, and I thank him for that. And, of course, I thank you and Senator Mikulski so deeply for your support and for your long service, each of you, on behalf of the people of Maryland. We are all grateful for that.

I am joined today by a contingent of family and friends and acquaintances: my wife, Jessica Strauss; my son, Ahmed Davis; my daughter, Loni Harris; my mom and my dad, brothers, sister, brothers-in-law, sisters-in-law, and my larger family, my wonderful family of clerks, who have served me so diligently and faithfully for so many years, and I appreciate the presence of all of them.

Thank you, Mr. Chairman.

Senator CARDIN. Thank you.

Senator COBURN. Judge Davis, I tend to agree with President Obama's statement about empathy being required at the court, but I also know there is a second goal, and that is, both stare decisis as well as the law. What role do you believe empathy should play in a judge's consideration of a case?

Judge DAVIS. Senator, I believe that empathy is one of those qualities that a life fully lived in the law and out of the law will come to be a part of a good and wise judge. I think it is a quality that permits a judge not to decide a case on the basis of the identity of the party before him or her. That would not be appropriate. But an empathetic judge, I think, Senator, is one who appreciates the burdens, the challenges that the litigants before him or her has met and to appreciate the importance of a fair hearing and a fair and impartial judgment in every case.

Senator COBURN. You had by your record several reversals by the Fourth Circuit on evidentiary matters in criminal cases. Taken together, what is your response to that? And what have you learned?

Judge DAVIS. Senator, in my nearly-14-year career as a Federal trial judge, on a few occasions I have, applying the law as announced by the Supreme Court and the Fourth Circuit, ruled in a

way that suppressed evidence at the request of a criminal defendant. In the vast majority of those instances where I have granted a motion to suppress, the Government did not appeal. However, as you point out, there have been a few instances in which the Government did appeal and in which the Fourth Circuit reversed my judgment.

I have in every instance taken the law as it exists, done my best to apply the law to the facts that I found before me, and render a decision that, in my judgment, was fair and impartial.

The Fourth Circuit has reversed those decisions on occasion and has done so in several instances and published opinions which would indicate, as I believe to be the case, that a number of those cases presented novel or issues of first impression, and the Fourth Circuit published the opinion so as to give guidance to judges, trial judges, going forward. But my judgment, Senator, is that my thinking on criminal law issues of procedure and substantive law very much are in the mainstream of thinking among Federal judges. Senator COBURN. Did they get it wrong, any of them, in your opinion?

Judge DAVIS. Well, there was one case—not in the criminal context—in which the Fourth Circuit reversed me, and the Supreme Court reversed the Fourth Circuit.

Senator COBURN. That is pretty good evidence, isn't it?

[Laughter.]

Judge DAVIS. Well, as the great Justice said, you know, the Supreme Court is not final because they are infallible. They are infallible because they are final.

Senator COBURN. Right.

[Laughter.]

Judge DAVIS. Reasonable judges can disagree about some of these issues, as you well know, Senator. Just last week, indeed, the Supreme Court in a 5–4 decision in the Fourth Amendment context greatly narrowed, if it did not overrule, a longstanding 1981 precedent relating to automobile searches. So these issues continue to evolve.

Senator COBURN. In your opinion, is there any role for international law in the interpretation and judging of the U.S. Constitution and our statutes?

Judge DAVIS. I have not seen any evidence at the circuit court level, Senator, that any court has seen fit or found it desirable to do so. Of course, the Supreme Court Justices themselves have some disagreement about the proper role. It seems to me in those few cases in which the Supreme Court has alluded to international decisions, it has been done in a very restrained way that simply pointed out that others around the world do or do not disagree with their interpretation of our Constitution. But I see no evidence that any judge in this country has ever believed or does believe that referring to international principles is the way to decide constitutional decisions in our system.

Senator COBURN. So you would have no trouble committing to this Committee that you will not use international law as you interpret our Constitution and our statutes?

Judge DAVIS. Well, certainly, Senator, to the extent that I am bound by the Supreme Court's pronouncements—and I would be if

I am lucky enough to be confirmed by this Committee and by the Senate—to the extent the Supreme Court has indicated in a particular context that international principles played a role in their decision of an issue, then it seems to me a circuit court judge could take that into account in applying that principle.

Senator COBURN. Yes, in terms of utilization of stare decisis.

Judge DAVIS. Yes, exactly.

Senator KAUFMAN. Yes, Judge Davis, how do you view your role different on the circuit court of appeals than on the district court?

Judge DAVIS. I am sorry, Senator. I——

Senator KAUFMAN. How are you going to see your role as different on the circuit court of appeals as opposed to the district court?

Judge DAVIS. I see. As you can guess, Senator, I am sure, I greatly enjoyed my time as a trial judge, being in touch with lawyers, litigants, and particularly working with juries. And if I am lucky enough to be confirmed, I surely will miss that aspect of the work. But the role of the circuit judge, of course, is to select and apply the correct standard of review, be it de novo, abuse of discretion, or clearly erroneous, and examine the record of proceedings below to ensure that the litigants received a fair and impartial judgment that is correct according to law and within the bounds of the factual record that was presented to the trial judge, and to do so collaboratively and collegially with the two panel members on which, as you know, circuit court judges sit as panels of three.

Senator KAUFMAN. I just want to thank all three of you for agreeing to come and help us deal with the problems in the Federal Government, and I think it is really a tribute to the country that you are willing to do this, and I just want to thank you for it.

Thank you, Mr. Chairman.

Judge DAVIS. Thank you, Senator.

Senator CARDIN. Senator Feingold is here, so before I start my second round, I will give Senator Feingold an opportunity.

Senator FEINGOLD. Thank you very much, Mr. Chairman. Welcome to all the witnesses and congratulations on your nominations.

Judge Davis, I would like to start with you. As I think you know, I have a longstanding concern about Federal judges' accepting expense-paid judicial education trips from groups funded by wealthy contributors that freely admit their purpose is to influence judicial decisionmaking. You went on a number of these trips, as I understand it, but also in the spring of 2004, you decided to accept an offer to join the board of directors of one of the groups that provides these trips, the so-called Foundation for Research on Economics and the Environment, known as FREE. FREE promotes what it calls "free market environmentalism." It is well known for its opposition to many of the major environmental laws of our country, and, not surprisingly, its financial support comes from major corporations and conservative foundations.

As I understand it, an ethics complaint was filed against you for serving on FREE's board, and that led you to request an opinion from the Committee on Codes of Conduct. The Codes of Conduct Committee gave you its opinion on March 30, 2005, and you decided then to resign from the board. I want to thank you for providing that opinion and your letter requesting it to the Committee.

Let me ask you first about your letter to the Codes of Conduct Committee requesting its opinion. You assert in the letter that you do not see any difference between the ethical propriety of serving on FREE's board and taking a trip funded by FREE. It seems pretty clear to me that joining the board of an organization like FREE is actually a much more significant indication of your involvement with the organization and poses in my mind very different ethical questions.

Did you really not see the difference then, or do you see the difference now?

Judge DAVIS. I absolutely see the difference now, Senator. I did not see it back in the spring of 2004 when I was invited and agreed to join the board.

Senator FEINGOLD. What is it that you understand to be the difference now?

Judge DAVIS. Well, I have the advisory committee's opinion, the committee's opinion spelling out, as they point out, while the issue is difficult for them—they debated it for over a month—ultimately they came down on the side, having examined, among other things, the FREE website, that there was an appearance of impropriety in a judge's service on that board. And I immediately, as you point out, took action to terminate my relationship as a board member.

Senator FEINGOLD. Thank you, Judge. You did not say much at the time about your reasons for resigning, but in a June 2007 statement in a court proceeding, you asserted the committee had found a tension between your service on FREE's board and one or more of the canons of the Code of Conduct for United States judges. But as I read the opinion, the committee very clearly said that your service on the board violated the two specific canons. It says, "Your service on the FREE Board of Trustees violates Canon 5B because there is no practical way for you to disassociate yourself from the policies advanced by FREE, and your affiliation would reasonably be seen as a personal advocacy of FREE's policy positions." And it said that your service on FREE's board "runs afoul of Canon 2A of the Code because it could create in reasonable and informed minds a perception that your impartiality may be impaired, and it lends prestige to FREE and allows FREE to exploit the prestige of the office."

There really was no wiggle room there at all, was there?

Judge DAVIS. I am not sure I understand the question, Senator.

Senator FEINGOLD. These are explicit statements of violating these canons, so this opinion really left no wiggle room around that. Is that correct?

Judge DAVIS. Oh, and that is exactly why I resigned, Senator. The comment I think that you are quoting from on the record came up in the context of a case in which an attorney sought my recusal from that case, which was a long-running case over which I had presided for many years, and he attempted to use, both before me and before the Fourth Circuit upon appeal in a mandamus action, the mere fact of my presence on the FREE board as a reason for my recusal from that case. And in denying the recusal motion, I simply alluded to, without having the opinion in front of me, trying to give him as much of an explanation for the circumstances which led to my resignation from the FREE board, I alluded to—I used

the language that you just quoted. But I did not mean by that allusion on the record to capture the full flavor or weight of the Codes of Conduct Committee advisory opinion. I agree with your characterization of it, and they specifically mentioned Canons 2 and 5 and had no——

Senator FEINGOLD. Obviously, then, Judge, you agree that the committee was saying unequivocally that it was improper for Federal judges to serve on FREE's board.

Judge DAVIS. I believe that is exactly what they said, Senator, although they did say that merely reading the canons themselves did not provide an answer to the question. They say that in the advisory opinion.

Senator FEINGOLD. OK. After reading the committee's opinion, I know you resigned from FREE's board, but did you discuss it with or give a copy of it to FREE or any FREE board member?

Judge DAVIS. I did not.

Senator FEINGOLD. Who did you share it with?

Judge DAVIS. Then-Chief Judge Wilkins of the Fourth Circuit, and you will recall, I think, the way this came up was the complaint was filed with the Fourth Circuit Judicial Council as a complaint of judicial misconduct. And in consultation with then-Chief Judge Wilkins, he and I agreed that the appropriate way to approach the matter was not to treat it as a complaint of judicial misconduct. No one ever really believed or alleged that I was guilty of misconduct. Rather, the question that was posed was a question of interpretation of the canons and the Code of Judicial Conduct. And Judge Wilkins and I then agreed that I would request of the Codes of Conduct Committee an advisory opinion, and that is exactly what I did.

And, of course, the advisory committee on its part pointed out very carefully that it does not have jurisdiction over claims of judicial misconduct, but they accepted my request for an advisory opinion in respect to the application of the canons as it relates—or as they relate to service on the board.

So it was something of a disconnect——

Senator FEINGOLD. I take it at this point you were aware that other Federal judges were similarly violating the Codes of Conduct here.

Judge DAVIS. Well, when I made the request, Senator, I did not believe I was violating the Code of Conduct.

Senator FEINGOLD. No, but once you got that letter, you were aware that other judges were in the same status, right?

Judge DAVIS. I was aware that other judges were on the FREE board.

Senator FEINGOLD. OK. Could you just explain why you took no further action when you knew that there were continuing violations of the Codes of Conduct by other Federal judges and are still taking place today?

Judge DAVIS. The understanding that I had, which has, frankly, recently been enhanced, is that an advisory opinion issued by the Codes of Conduct Committee goes to that judge at his or her request, and that there is an institutional, was my understanding, interest on the part of the Codes of Conduct Committee not to have released advisory opinions requested by individual judges.

As you, I am sure, know, Senator, each Federal judge has an independent obligation—and Justice, I might say, has an independent obligation to attend to ethical norms and to take appropriate steps to ensure that his or her behavior and activities comport with those norms at all times. And that is what I did, and when I got the advisory opinion back from the Codes of Conduct Committee, I took immediate action to take care of my issue, and I thought that that was the extent to which I had an obligation to proceed.

Senator FEINGOLD. Judge, this is not a favorite part of being a Senator asking these kinds of questions, but I think you made a genuine attempt to answer. I am very concerned about this practice, as I know you understand, of taking these trips and being involved in these kinds of boards. And I appreciate your answering the questions.

Senator CARDIN. Would the Senator yield? I am not going to take it off your time. If I could just put into the record that paragraph that Judge Davis referred to from the opinion, which reads—and I will put the whole letter in the record. “We note that your inquiry is a difficult one. It was debated at length by the Committee. We understand that the advice we gave you today would not be obvious from reviewing the canons and our previous advisory opinions. In the past, the Committee often has assumed that the inquiring judge is in the best position to evaluate the activities of a board on which he or she serves and has deferred to the inquiring judge’s determination about the propriety of service. However, in light of the wealth of information about FREE that is now available to us and to the public, we believe that we are in a position to provide you with advice as you have requested. Thus, while we never before have advised judges about this issue and acknowledge that you reasonably could have arrived at a different conclusion, after diligently reviewing the most relevant Code of Conduct material available to you, we have advised you now that your continued service on the FREE board in the future is inconsistent with Canons 2 and 5 of the Code of Conduct.”

I thank the Senator for yielding.

Senator FEINGOLD. And I ask that the entire letter be placed in the record.

Senator CARDIN. The entire letter, yes.

Senator FEINGOLD. Thank you.

Senator FEINGOLD. Thank you, and thank you, Mr. Chairman.

Senator CARDIN. Thank you, Senator Feingold.

If I might, to both Judge Davis and Judge Hamilton, Secretary Perez’s work in pro bono is well known.

I know from each of your records that you have been involved in pro bono, so I know that. My question to you is that, as an individual, as an attorney, as a judge, and, if confirmed, as an appellate court judge, how do you see your role in advancing equal opportunity before our courts, particularly those who do not have the resources to have the opportunities that others have in getting access to our judicial system? Judge Davis?

Judge DAVIS. Senator, I have throughout my professional career had a deep belief in and commitment to the ideal of pro bono. I think it is something that every lawyer and every judge who is

privileged to be a member of this great profession of ours has such a responsibility. And I have worked diligently throughout my career to both increase opportunities for judges and lawyers to participate in pro bono activities and, more specifically, to ensure that the underserved and our young people and community members at large learn about the legal system, know their rights, and I have done so on both an individual basis and as a part of institutions. For example, just very quickly, our court, like, I am sure, most Federal courts, makes available to pro se litigants form documents which permit pro se litigants, when they cannot find a lawyer say in an employment case or other kind of case, to come to the courthouse, pick up this form, which contains a series of check boxes and some place for writing in facts. We make it as easy as possible for these persons who have to represent themselves to come to the court and seek justice.

Just last week, for another example, our court, under the extraordinary leadership of Magistrate Judge Garvey, for not the first time put on what we call in the Federal system the "Open Doors Program," where high school students from around the Baltimore region spent the morning, including lunch, at our courthouse, put on a mock trial. I was privileged to preside over such a mock trial put on by students who served as a jury from Mergenthaler High School right there in Baltimore.

And so these are just some of the activities that I, both in my institutional capacity and in my individual capacity, reach out to the community, young people, and pro se litigants to ensure that they know about our criminal justice system, they know about our civil justice system, and know that we are there for them even when they cannot get a lawyer and that we value increasing their knowledge about the justice system.

Senator CARDIN. I want to ask a question that Chairman Leahy always asks those who are seeking to become judges, and that is, can you share with us a moment during your career where you stood up for something that was not popular, stood up for people who were disadvantaged, whether it was against Government or big companies, that indicated your willingness to step forward in order to protect the rights of individuals? Judge Davis, you seem anxious to go.

Judge DAVIS. Well, Senator, I would like to think that I brought that kind of approach to my work as a judge. Frankly, one case that might fit the mold of the question you have just asked is the case involving attempts by disabled individuals to require the circuit court for Baltimore City to bring the court facilities up to minimum standards for those who are disabled. And I, through our random assignment system, got that case. My good friend Judge Robert Bell, Chief Judge of Maryland, was named as a defendant in his official capacity, as were other judges on the court. And the claim was one of Federal law, and it was, to be sure, somewhat awkward to be sitting in such a case.

But, Senator, I did not hesitate, and the defendants in that case were ably represented by members of the Attorney General's Office of the State of Maryland, and I, on the basis of the record that was before the court, did not hesitate to enter a summary judgment in favor of the plaintiffs, the disabled individuals who wished to force the city of Baltimore and the court system in Maryland to take appropriate

action, long overdue, to bring admittedly older structures but structures that housed important governmental offices such as courts into compliance with Federal law.

So I entered that judgment. It was a very collaborative process between the plaintiffs and defendants in that case, and so that is certainly one of my instances where I stood up to judges and the local and State authorities to say Federal law requires this, these individuals have every bit of right to have full access to these facilities and these programs as required by the Congress of the United States, and you have got to do it. And I am happy to say that compliance, though it took a little while, was achieved and the building was brought up to standards. And I am very proud of that.

Senator CARDIN. And how is your relationship with Judge Bell these days?

[Laughter.]

Judge DAVIS. I got very warm wishes from him just recently, Senator, and he wished me well.

Senator CARDIN. I was looking. I do not know if I saw a letter from him or not.

[Laughter.]

Senator CARDIN. The record of the Committee will remain open—let me get my formal notices here. The hearing record will remain open for 1 week for additional statements and questions from Senators.

Again, we ask the witnesses to respond promptly to the questions that are asked by members of the Committee. Without objection, Chairman Leahy's statement will be made a part of the record.

I want to once again thank our nominees not only for being here and their responses to the questions that were asked, but their continued service in the public. All three of you have made incredible contributions and are going to continue to do that, and it is a pleasure to have you before our Committee. Thank you very much.

Judge DAVIS. Thank you very much.

ALBERT DIAZ
WEDNESDAY, DECEMBER 16, 2009
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 3 p.m., Room 226, Dirksen Senate Office Building, Hon. Benjamin A. Cardin presiding. Present: Senators Klobuchar, Specter, Franken, Sessions and Hatch.

OPENING STATEMENT OF HON. BENJAMIN L. CARDIN, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator CARDIN. The Committee will come to order. Let me thank Chairman Leahy for allowing me to chair this hearing.

I first want to acknowledge two of my former colleagues from the House of Representatives. I do that, Senator Burr, because I served a lot longer in the House than I have been in the Senate. So it was nice that we have a hearing of North Carolina judges to bring Congressman Watt and Congressman Butterfield to our Committee room. We welcome both of them to the Committee room.

I take special interest in the court circuit. It is a Fourth Circuit in which, of course, Maryland is a party to. We currently have four vacancies. I guess it is about 20 to 25 percent of the workload. So it is critically important that we move forward on the confirmation process in the Fourth Circuit.

I am pleased that we have been able to confirm recently two additions to the Fourth Circuit, last year and this year, and that we have another person who has been approved by our Committee. But we have already confirmed Judge Agee from Virginia and Judge Davis from Maryland, and we have had a hearing on Justice Keenan from Virginia, who has received the voice vote from our Committee and we are hoping that she can be confirmed prior to the end of this session of Congress.

It is important that we move forward with these nominations. As I evaluate judicial candidates, I use several criteria. First, I believe judicial nominees must have an appreciation for the Constitution and the protections it provides to every American. Second, I believe each nominee must embrace a judicial philosophy that reflects mainstream American values, not narrow ideological interests. Third, I believe a judicial nominee must respect the role and responsibilities of each branch of government. Finally, I look to a strong commitment and passion for the continued progress for civil rights protection.

We are fortunate to have two nominees before us who have devoted a good deal of their life to public service and we thank them for their public service and we thank their families, because we know this is a joint sacrifice.

Judge Diaz also comes to this Committee with a broad range of both judicial and legal experience in both civilian and military court systems.

Judge Diaz currently serves as a special superior court judge for the complex business cases, one of only three in the State of North Carolina.

Judge Diaz began his legal career in the United States Marine

Corps, Legal Services Support Section, where he served as a prosecutor, defense counsel, and, ultimately, chief review officer. He then moved to the Navy's Office of Judge Advocate General, where he served for 4 years as appellate government counsel, handling criminal appeals.

In 1995, Judge Diaz left active duty in the Marine Corps and worked as an associate at Hutton & Williams, with a primary focus on commercial litigation. He remained in the Marine Corps Reserves while in private practice, serving as Reserve appellate defense counsel in the Navy JAG Corps, a Reserve military judge in the U.S. Navy and Marine Corps judiciary, and a Reserve appellate military judge in the U.S. Navy-Marine Corps Court of Criminal Appeals.

He resigned as a military judge when he retired from the Marine Corps in 2006. Once again, a very impressive record.

Judge Diaz was the first Latino appointed to the North Carolina Superior Court, where he was named as a resident superior court judge in 2001. In 2002, he was appointed as a special superior court judge and he was designated a special court judge for the complex business cases in 2005.

He earned his BS from the University of Pennsylvania's Wharton School. He received his JD from NYU School of Law, and he earned his master's degree in business administration from Boston University. Judge Diaz is nominated for the Fourth Circuit Court of Appeals and received a rating of unanimously well qualified by the American Bar Association.

So we thank both of you for your willingness to continue to serve in the public. I want to compliment particularly your two Senators, one a Democrat, one a Republican, working together to bring us the very best for our consideration. It is a model for other states to follow and I compliment both Senator Burr and Senator Hagan.

We will start with the introductions by your two Senators.

Senator Burr.

Senator Burr, just for one second. I see that Senator Sessions has arrived. If I could yield first to Senator Sessions and then we will—

Senator BURR. Gladly.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you. Sorry to be running late. We just had an Armed Services hearing I had to be a part of.

Mr. Chairman, it is good to be with you. We will have two nominees today for hearing, which is unusual and not something we do often, but it is something we were requested to do. And the nominees sort of have come forward together for the same circuit and the desire, I understand, is to keep them together.

So I think under those circumstances, I have agreed to go forward with both nominees today and I look forward to a good hearing.

Senator CARDIN. Senator Burr.

PRESENTATION OF JAMES A. WYNN, JR., NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE FOURTH CIRCUIT AND ALBERT DIAZ, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE FOURTH CIRCUIT BY HON. RICHARD BURR, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator BURR. Thank you, Mr. Chairman. I hope to solve 50 percent of the Fourth Circuit vacancies with a North Carolina solution.

I thank you and Senator Sessions. I want to welcome not just our nominees, but I want to welcome their family and their friends who are here to celebrate in this day.

It is a great pleasure for me to introduce not just one, but two nominees for the Fourth Circuit court.

Judge Wynn and Judge Diaz may be unique in the legal community in which they both serve not only because of their impressive credentials, but, also, their outstanding character and commitment to public service.

Both of these men have served their country in the military and I am particularly grateful to them for that service.

Judge Diaz also started his legal career in the JAG Corps, but as a United States Marine. He enlisted in the Marine Corps at age 17 and broke his mother's heart. She had hoped that he would go to college and be the first in his family to get a college degree.

Judge Diaz felt strongly that the Marine Corps would be best for him. He had a friend who had joined before him and he could see that it had changed his way of life.

Judge Diaz said, and I quote, "I just looked at him and thought, 'I need some of that,' " unquote. Well, a young 17-year-old convinced his mother to sign him to join, however, by promising her that the Marine Corps would not keep him from going to college.

Judge Diaz followed through on his commitment to his mother. Two years into his service in the Corps, he joined the ROTC program to go to college and then on to law school to become a Marine Corps JAG. He continued to serve until October of 2006, when he retired as a lieutenant colonel.

He, too, shows a commitment to his community, working as a truancy court judge for elementary school kids, meeting regularly with their parents to determine what kind of issues may be interfering in their children's school attendance.

He recruits mentors from the legal profession for "Lunch with a Lawyer," a program for middle schoolers who are interested in legal careers. The kids sit down and have lunch with a lawyer once a month to learn about their careers. He says eighth graders generally do not know what they want to do with their lives, but that the program is a good way to mentor kids who need role models to help them think more about the future.

We will just have to give Judge Diaz the benefit of the doubt that it is a positive thing to draw more kids into the practice of law.

Judge Diaz currently serves as a superior court judge in the North Carolina business court. He has been praised by those who have practiced before his court as fair and impartial as a judge, but, also, they refer to his dealing with some of the most difficult cases. He says this is just a testament to the work ethic he learned in the Marine Corps and that the greatest experience anyone can have is to serve their country in some way.

I quote Judge Diaz, "Democracy isn't free. We have to remember to work for it."

He says he works hard, but remembers the limits of the bench; that his responsibility is to faithfulness of the law. Beyond that, he said he just treats people with dignity and respect.

He is joined today by his wife, Hilda, and his daughter, Christina. His youngest daughter, Gabriella, is also taking exams today. We have so many similarities between these two nominees. Mr. Chairman, I am proud to present to the Committee two distinguished nominees for the Fourth Circuit court and I suggest that this Committee look for an expedited review and referral to the full Senate so that that deficiency on the Fourth Circuit can be filled.

I thank the Chair and I thank the Ranking Member.

[The prepared statement of Senator Burr appears as a submission for the record.]

Senator CARDIN. And we thank you very much for your support. Senator Hagan.

PRESENTATION OF JAMES A. WYNN, JR., NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE FOURTH CIRCUIT AND ALBERT DIAZ, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE FOURTH CIRCUIT BY HON. KAY HAGAN, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator HAGAN. Thank you, Mr. Chairman. I, too, want to welcome Judges James Wynn and Albert Diaz and thank both of them for being here today and for the service that they have both given our state and nation over the past several years.

I also want to thank President Obama for selecting such exemplary nominees. And I sincerely want to extend my gratitude to my esteemed colleague, Senator Richard Burr, for working so hard with me to ensure that North Carolina has adequate and highly capable representation on the Fourth Circuit.

These two judges are exactly what we need on the Fourth Circuit Court of Appeals, for several reasons, and you have just heard Senator Burr's excellent qualities and biographies of these two esteemed gentlemen, and I will not go any further into their biographies. I also see Congressman Mel Watt here, who so ably recognizes the citizens in North Carolina.

But when I first came to the U.S. Senate earlier this year, I had high hopes for increasing the number——

Senator CARDIN. Congressman Butterfield is also there.

Senator HAGAN. I did not see Congressman Butterfield. And Congressman Butterfield—I am so sorry—also, who so ably represents his district in North Carolina.

But when I first came to the Senate earlier this year, I had high hopes for increasing the number of North Carolinians on this court.

North Carolina is the fastest-growing and largest state served by the Fourth Circuit; yet, only two of the 15 seats were filled by the abundant talent from our state. And over the past century, North Carolina has had fewer total judges on this court than any other state.

Furthermore, there have been inexcusable vacancies on this court throughout history and given that the United States Supreme Court only reviews 1 percent of the cases it receives, the Fourth Circuit is the last stop for almost all Federal cases in the region, and we must bring this court back to its full strength.

Since 1990, when this circuit was granted 15 seats, it has never had 15 active judges. But specifically, there has been a history of partisan bickering over the vacancies on the Fourth Circuit.

But with these nominees and this process, we are changing the course of history and I am very excited about confirming these judges.

However, I know that members of this Committee will be less interested in these historical issues than they will be in the particular qualifications and experiences of these two accomplished judges.

I am proud to note that both of them have received unanimous ratings of well qualified from the American Bar Association. They both bring a wealth of experience in the courtroom, advising courts and judges and serving in the armed services.

These judges show respect for the law and apply it as it is written. Editorials in newspapers throughout North Carolina have praised these nominations. The Charlotte Observer said, "Judges Wynn and Diaz are widely regarded as intelligent, ethical judges, who have won respect for their judicial and military careers. They are the kind of judges the Federal bench needs. Their quality is so unquestioned that only partisanship could stall their nominations." The Raleigh News and Observer said, "There appears to be no good reason they shouldn't be moved through the confirmation process with dispatch."

And I am honored to have the opportunity to play some role in this process and that we are now moving toward putting Judge Diaz and Judge Wynn on the Fourth Circuit bench.

I want to express my sincere gratitude to this Committee for holding this hearing today.

Thank you, Mr. Chairman and Mr. Ranking Member. Thank you very much.

[The prepared statement of Senator Hagan appears as a submission for the record.]

Senator CARDIN. I want to thank both Senator Hagan and Senator Burr not only for their testimony here today and their introductions, but the manner in which these nominees have been brought forward.

I particularly want to thank Senator Sessions for accommodating the fact that we could take two appellate court judges in one hearing, because that is unusual. We normally want to have a separate hearing on each of our appellate judges.

So I want to thank Senator Sessions. I think it reflects the fact that the two Senators worked together in a nonpartisan manner to bring us forward the nominees.

So congratulations to both of you.

We will now proceed to the hearing of the two judges, if they would come forward please and remaining standing, if you would, please.

We ask that you take an oath, which is traditional in the Judiciary Committee.

[Nominees sworn.]

Senator CARDIN. Thank you.

Judge Diaz.

STATEMENT OF ALBERT DIAZ, NOMINEE TO BE UNITED STATES CIRCUIT JUDGE FOR THE FOURTH CIRCUIT

Judge DIAZ. Thank you, Mr. Chair and Mr. Ranking Member, for holding this hearing this afternoon. I know how busy you all are

and we appreciate the opportunity to appear before you.

I don't have an opening statement. I simply want to thank the President for his confidence in me. If confirmed, I hope to do all I can to justify his confidence, as well as the confidence of the American people.

I want to thank Senator Burr and Senator Hagan for their kind introductions here this afternoon.

You did identify, Senator Cardin, some of my family members. But if I might, I want to take a moment to identify some others, as well as friends that are here.

My wife, Hilda, is here. She has put up with me for 25 years and it is clear that I would not be here without her. I love her very much and I appreciate her support.

My daughter, Christina, is here, who graduated from Chapel Hill last year. I am very proud of her and I am happy to have her support, as well. As was mentioned, my daughter, Gabriella, is very upset because she is not here, but she is doing God's work by getting through her freshman year and hopefully everything will be just fine with her.

I have my brother, Edwin Diaz, here, who is an assistant deputy warden with the New York City Department of Corrections in Riker's Island. Every time I think that I have a difficult job, I just look to him and realize how fortunate I am and that he is doing that kind of work. His wife, Stacey Haliburton, is here, as well. She is also a corrections officer in New York City.

My two nephews, Joel and Javier Diaz, are here, as well. Stacey's daughter, Amanda Radcliffe, is here. I am pleased to have them here. My college roommate Clark Brett, a former Marine who served on active duty with me for a time, is here. I am very pleased that he is here in support of me.

I have several other Marine colleagues who are here, two retired colonels, Roger Harris and Michael Rayhouser are here in support of me and I am so pleased that they are here, as well. And two friends from Charlotte, North Carolina, Georgia and Robert Lewis are here, as well, in support of me this afternoon.

So thank you, Mr. Chairman, for the opportunity to introduce them, and Mr. Ranking Member.

[The biographical information follows.]

Senator CARDIN. Thank you. Let me just inform the people that are here that a vote has started on the floor of the U.S. Senate.

I am going to yield to Senator Sessions to allow him to go first. We anticipate that we will be able to keep the hearing going during the vote. There is only one vote that is scheduled. We may have to take a short recess, but we hope to keep the hearing open.

Senator Sessions.

Senator SESSIONS. [Off microphone.] While both of the nominees have impressive backgrounds, including extensive service to their country, the Senate does have a constitutional duty to review these nominees carefully. I would just say that, of course, your backgrounds have been examined. FBI has done their background work.

The ABA has done theirs. The President and Department of Justice have done theirs, and members of the staffs of the Committee have also looked into that. You would not be here if we were not making some progress through those investigations. This is a lifetime appointment

and it requires that kind of review.

I am pleased to see that both nominees have the support of your home state Senators. That means a lot to all of us. You have got two Senators who have spent time at this and they have strongly supported you and that is valuable to us.

Both Judge Diaz and Judge Wynn were nominated by the President on November 4, 2009. So this is a quick turnaround for any circuit court nominee. It is especially quick for a nominee to the Fourth Circuit.

Steve Matthews, who President Bush nominated for the same seat on the Fourth Circuit which Judge Diaz has now been nominated waited 485 days for a hearing that never occurred.

So there are other examples, I think, of unreasonable delay and obstruction, but I am not going to talk about that today. How about that? I just want to say that I am pleased that we could move you forward at what is really a fairly rapid pace, I have to say.

Both of your records have been examined and I will not go into a lot of detail.

What about, both of you, we have Federal sentencing guidelines that are rather significant and reduce the freedom that judges in state court may have had with regard to sentencing. Are you familiar with that, and are you committed to—how do you view, since the Supreme Court has reduced the binding nature of those guidelines, how do you feel about the general principal that sentences should be within the guideline range under normal circumstances?

Judge Diaz.

Judge DIAZ. Thank you, Mr. Ranking Member. I appreciate the question. Although I am not directly familiar with Federal sentencing guidelines, because we operate under a state court system, we do have a fairly analogous system in North Carolina called structured sentencing, where a judge's discretion is cabined by the severity of the offense and the prior record of the offender, and that provides a grid box where the judge's discretion is limited by an aggravated, a mitigated and a presumptive range of sentences, and that system has worked very well for North Carolina.

I agree that, as a general principle, it should not be to the detriment of a defendant who it is that he or she appears in front of in determining what type of sentence should be awarded.

So I do agree that there is some benefit to relative uniformity of sentences and we have had some good experiences in North Carolina with that process, and I would commit to you that I would follow the law with respect to Federal sentencing guidelines, if I were confirmed.

Senator SESSIONS. Thank you. Both of you have dealt with lawyers and clients. Would you describe briefly your view about how an advocate ought to be treated in your courtroom and how you will treat them, if you are confirmed?

Judge DIAZ. Thank you, Senator, for that question. I agree with my colleague. I believe that respect is the coin of the realm when it comes to our justice system. As important as it is to administer justice, it's equally important that citizens believe that justice is being fairly administered and part of that is having dignity and respect

both for the process and the litigants.

Lawyers have a very difficult job, I know that, having been a civilian practitioner, as well as a military practitioner. It is a difficult task to balance client interests, as well as the integrity of the process. And judges ought not to sit as princesses or princes domineering the process.

It ought to be a respectful, two-way process, with dignity for all participants. The judge has to be in control, obviously, but he can do that while ensuring dignity and respect for all concerned.

Senator SESSIONS. Thank you.

Senator CARDIN. Thank you, Senator Sessions. We are going to need to take a brief recess because of the vote that is on the floor. I have been informed that we will not be able to continue the hearing at this time. So it will be a brief recess and we will be returning. [Whereupon, at 3:34, the Committee was recessed, to reconvene at 3:50.]

Senator CARDIN. The Judiciary Committee will come back into order, please. Again, we apologize for the recess. It was unavoidable due to a vote on the floor.

We are joined by Senator Franken. We welcome him to the Committee.

Let me ask, if I might start off with some questions and just point out what Senator Sessions pointed out, which I think is critically important. The confirmation hearing is part of the process.

Prior to your selection by the President, there was a long questionnaire that you had to fill out. I am sure it took you a long time.

You probably had to recall things in your background that you had long thought would never be relevant again in your life.

So we have a lot of material. You have written a lot of opinions.

You have given many speeches. All that has been reviewed by our staffs. We have summaries of that here.

So the confirmation hearing is one part of the confirmation process.

As Senator Sessions pointed out, this is the court of appeals, where most of the court decisions are going to be reached in the Judicial Branch of government, because the Supreme Court takes very few cases. And this is a lifetime appointment.

So we treat the confirmation hearings very seriously and the confirmation process very seriously. I say that knowing full well that

your backgrounds are incredible and your records are very strong.

But let me ask a question that was asked to you before, but I want you to elaborate a little bit more, and that is on your judicial philosophy, how you will go about reaching decisions and how your background will impact the way in which you go about evaluating the decisions of the cases that come before you.

Mr. Diaz. Thank you, Senator.

Senator CARDIN. You have to turn your mic on, please.

Mr. Diaz. Thank you, Senator, for the question. I have tried in each and every case that has come before me, in terms of deciding cases, particularly as a trial judge, where the cases come frequently and often in a very busy docket, to rely on the lawyers to give me as much information as possible regarding the law and, obviously, the evidence that comes before the court.

I think it is critically important that a judge listen carefully to all points of view in a courtroom and recognize that his or her decisions have consequences; that we are not dealing simply with an

academic exercise, but we are affecting, people's lives. And I try to do that in each and every case.

I also recognize the limits of the judicial decision-making process. We do not sit as a super legislature. We are not here to change policy, in a broad sense. We are here to decide cases and resolve disputes. And so I take that with me to the bench each and every day and hope to decide cases narrowly, with much restraint as possible, resolve the disputes that come before the court, but give all parties a full and fair opportunity to be heard, recognizing that I do not know everything there is to know about the law and certainly do not know anything about the facts before the parties come before me.

So it is an open process and I try to be as considerate as possible. But in the end, I make a decision and then live with it and decide later on or at least the appellate authorities can decide later on whether or not I have made the correct decision. I hope to do so in every case.

Senator CARDIN. The Fourth Circuit is one of the most diversified circuits in our country. Just looking at the numbers, it consists, of course, as you know, of Maryland, Virginia, West Virginia, North Carolina, South Carolina. Twenty-two percent of the residents are African-American. In North Carolina, it is even more diverse; 32 percent are African-Americans.

So I want to talk a little bit about diversity and how important it is to have diversity on our bench. And a related issue, the oath that you take as a Federal judge requires you to render your judgment without respect to the wealth or poverty of the person, to give equal justice to all, which, I would submit, is a goal that has not yet been reached in our system.

So my question is, how important is diversity in our bench and what does your background, your individual backgrounds, what role does that play in dispensing of your decisionmaking or your responsibilities on the bench?

Senator CARDIN. Judge Diaz, does empathy have any role to play here? President Obama said he was looking for empathy in the nominees that he would submit to the courts.

Evidently, you all passed the test. Does empathy have any role here?

Judge DIAZ. Thank you for the question, Senator Cardin. First of all, I certainly do not presume to speak for President Obama and what he meant by that comment. I am honored that he felt that I have satisfied his requirements for this nomination and I am pleased to be a part of this process.

I do believe that empathy has a role to play in our judicial process, but not as the ultimate—as part of the ultimate decisionmaking process. Where I think empathy is important is, as I indicated earlier, in recognizing that our decisions have consequences and in recognizing that we, as judges, do not know everything there is to know, whether about the law or about the facts.

So it is critically important to listen carefully to litigants and lawyers, to engender respect and dignity for the process, because as important as it is to dispense justice, it is equally important that our citizens have the notion that there is the appearance of justice, and that is where empathy comes in; that folks believe that

they have gotten a fair shake, that the judge has listened carefully to what it is that they have to say, considered all viewpoints.

But in the end, as my colleague, Judge Wynn, indicated, we, as judges, have to be fair and impartial arbiters. We do take that oath, if we are honored to do so, to do justice to rich and poor alike, and that is what I will do if I am honored by your vote for confirmation.

Senator CARDIN. I thank both of you for those answers. One last point and then I will turn it over to Senator Franken. And that is that is, the importance of pro bono legal services.

I have read your resumes and your backgrounds and your answers to those questions that were compounded by the Committee.

As a judge, you cannot handle pro bono cases. But as a leader in the Judicial Branch, you have a responsibility for leadership in access to justice, regardless of wealth.

So how do you see the role you can play as an appellate court judge in promoting programs to provide equal access to justice? I am going to preface your answer by what was done by the head of the Maryland courts, the chief judge, when he required lawyers to report on their pro bono activities as part of their professional responsibility. He helped expand access in Maryland.

How do you see your role as an appellate court judge in helping us achieve the goal of equal access to our courts?

Judge Diaz, we will start with you again.

Judge DIAZ. Thank you for the question, Senator Cardin. And I appreciate the importance of what it is that you are getting at.

I do believe, and I tried, in my private practice, in particular, to honor the commitment to pro bono work. We have a privilege as lawyers to practice law. It is not a right and it is something that we have an obligation to give back to whenever we can, and I have tried to do that and did that when I was in private practice. You have that information before you.

As a judge, I think it is critically important that we serve as role models in encouraging, not dictating—I do not think that we can dictate those requirements, because I do not know that required pro bono is necessarily effective pro bono work, but certainly encouraging lawyers to come forward and give of themselves and give of their time and service.

I have often chaffed against the notion that judges need to live a monkish lifestyle. We serve as role models. We ought to be public officials out amongst the public, understanding our limitations. We have to be careful about what it is that we say.

But because of our role as judges, we have an important responsibility to ensure that lawyers are encouraged to give back in every way that they can. And so I commit to you, Senator, that I would do that.

Senator CARDIN. Thank you.

I am going to turn the gavel over to Senator Franken. When he is completed, he will adjourn the Committee.

Senator FRANKEN. [Presiding] Thank you.

Senator CARDIN. You are chairman.

Senator FRANKEN. I guess, yes, I am chairman.

Senator CARDIN. Seniority moves quick around here.

Senator FRANKEN. Well, congratulations to both of you for your nominations. I want to go back to diversity again, because you are

both military judges. Right?

Judge DIAZ. Yes, Senator.

Senator FRANKEN. Do you think that is a good idea to have two military judges on the same appellate court? That is not unusual, is it; or is it?

Judge DIAZ. But only for an hour or so, Senator, no longer.

[Laughter.]

Senator FRANKEN. But, say, if a Marine came before you, that would not matter, you would give them equal justice, or her.

Judge DIAZ. Absolutely, Senator. Absolutely.

Senator FRANKEN. Seriously, how do you think your experiences in the military inform your work as a judge not in the military and especially on an appeals court?

Judge DIAZ. Senator, I agree with my colleague, Judge Wynn.

Part of what little success I have enjoyed as a civilian judge I attribute directly to my experiences in the military.

I served as both a military trial judge and an appellate judge. So I have had some appellate experience while serving in the military.

It has been my honor to serve my country.

I also think that, as a practical matter, having that experience is going to be useful on the Fourth Circuit, because we do deal or would, if we were confirmed, deal with cases involving national security on occasion in the Fourth Circuit that come up from the Eastern District of Virginia, and I believe that our collective experiences as military officers would hold us in good stead with respect to those cases.

Senator FRANKEN. So sometimes we have this argument in this Committee about the role of diversity and it seems to me that when you talk about experience, I think it was Oliver Wendell Holmes who said experience is the law.

Help me, if you can, make this distinction where we have lots of nominees come before us who have said something like diversity is very important, experience is very important, and then we get a little pushback from people saying, “Ah, but you have to be completely neutral as a judge.”

What is a good way to reconcile—how would you put reconciling those two?

So, Judge Diaz, that sort of assumes that experience—people just intuitively understand that experience is going to inform judgment. It just is.

In other words, if you trust the judiciary because there is a diversity of experience there, if that creates that more trust, that is because human beings understand that experience informs judgment, and, yet, your job is to treat everyone equally and to be neutral and judge on the law.

Is there a conflict there or is there not a conflict there?

Judge DIAZ. I do not think there is, Senator. I think in the end, as my colleague, Judge Wynn, said, one of the principal benefits of having a diverse bench is to inspire confidence in our larger institutions.

A few years ago, the Supreme Court decided a case involving diversity in law school admissions processes and Justice Sandra Day O’Connor emphasized the importance of diversity in bringing together differing views in order to enrich the academic experience.

And in part, she said one of the reasons why it was important

to have a diverse legal profession was the importance of lawyers in the governance of our institutions and military institutions and the executive branch and in the judiciary.

It is critically important that people have—our citizens have an understanding that not only justice is being done, but the appearance of justice is being satisfied, and I think that is where having a diverse set of views comes into play and encourages that conclusion.

Senator FRANKEN. Well, I would like to thank both of you and congratulate both of you. Like Senator Cardin, I am incredibly impressed with your background and your experience.

We are going to keep the record open for 1 week for written questions, and our hearing is adjourned. Thank you, gentlemen.

Judge DIAZ. Thank you, Mr. Chairman.

[Whereupon, at 4:09 p.m., the hearing was concluded.]

BERNICE DONALD
WEDNESDAY, MARCH 16, 2011
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:28 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Charles E. Schumer, presiding.

Present: Senators Schumer, Coons, and Grassley.

OPENING STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Good afternoon, everybody, and we are 2 minutes ahead of schedule, which, as Senator Alexander will tell you, does not happen that often when I am chairing something. So it is a wonderful occasion. I am glad he could share in it.

Anyway, I want to welcome all the nominees who are here today. I thank Chairman Leahy for the opportunity of chairing this hearing. I want to welcome the families and friends who have come to support them and thank Senator Grassley for serving as Ranking Member and being so diligent, as he always is.

I am going to recognize Senator Grassley for an opening statement because he has to go somewhere else briefly, and he will be back. And then we will get on with the rest of it.

Senator GRASSLEY. I am going to take 10 minutes off after my statement for the Lone Tree High School students who are here to ask me a few questions. In my opening statement—I am going to put the whole thing in the record, but I would like——

Senator SCHUMER. Without objection.

Senator GRASSLEY. I usually give an update, and then I would like to speak about one of the people that have an Iowa background that you nominated. That is why you nominated him.

Senator SCHUMER. We have a lot of great Iowans in New York. We do.

Senator GRASSLEY. Over the past few days, we have confirmed five more nominees to vacancies in the Federal judiciary. In the short time we have been in session, we have confirmed 12 judicial nominees, more than in the same period of any of the previous four Presidents. Nine of those confirmations were for seats designated “judicial emergencies.” This year, we have reported 22 nominees out of Committee. With this hearing, our fourth hearing, we will have heard from 17 judicial nominees this year. In total, we have taken positive action on 33 of 58 judicial nominations submitted to the Senate.

Senator SCHUMER. Now let me call on Senator Alexander, who is here to introduce our second nominee.

PRESENTATION OF BERNICE BOUIE DONALD, NOMINEE TO BE CIRCUIT JUDGE FOR THE SIXTH CIRCUIT, BY HON. LAMAR ALEXANDER, A U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator ALEXANDER. Thank you, Mr. Chairman and Senator Grassley, for letting me come. I am here today to introduce Judge Bernice Donald, who has been nominated by the President to be United States Circuit Judge for the Sixth Circuit.

Judge Donald has been a judge for 28 years, and I am certain

this Committee will do its usual thorough job in assessing her professional credentials, which are considerable. But what I would like to say briefly in introducing her is something the Committee may not be as likely to know about, and that is her reputation as a person in Memphis and in Shelby County.

Judge Donald came from humble beginnings, the daughter of a domestic worker and a self-taught mechanic. She is the sixth of ten children. She began working as a dispatch supervisor with the telephone company before she got her law degree at Memphis State University, what was then called Memphis State University. She has been a pioneer for African-Americans in Memphis and Shelby County as a student, as a bankruptcy judge, as the first black female district court judge, first woman of color to serve as an officer of the American Bar Association in its 130-year history. She has been a community leader with at-risk youth; especially she works with young people, and she has been very active at the University of Memphis. She is here with her husband, W.L. She is here with a number of her other friends and supporters from Memphis and Shelby County, and I am delighted to introduce her to the Committee and recommend her nomination and especially let the Committee know about this extraordinary record of community service and personal achievement in our largest county and biggest city.

Senator SCHUMER. Well, thank you. Thank you very much, Senator Alexander. And I know how busy you are and I know it speaks extremely well of our nominee that you came to be here to introduce her. So thank you for being here, and I know you have a busy schedule, so feel free to move on.

Next we are going to call up Judge Donald. Judge Donald, welcome, and I have to swear you in. Judge Donald, please raise your right hand. Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge DONALD. I do.

Senator SCHUMER. Thank you. Please have a seat.

OK. So you may now introduce your family and friends who are with you today because I know it is a proud moment for them.

Judge DONALD. Thank you, Chairman Schumer. First, I would like to express publicly my thanks to President Obama for his confidence in nominating me for this position. I would also thank the senior Senator from Tennessee, Senator Lamar Alexander, for his generous introduction, and Senator Corker in his absence. And I certainly want to thank you, Mr. Chair, and this Committee for scheduling this hearing.

I do have a number of friends and family this afternoon, but I understand that time is short, so I may ask a number of them to stand. But I do want to express my thanks for the presence of these family and friends: my husband, W.L. Donald; my sister, Virginia Bouie Wilson; her husband, Reverend Bobby Wilson; my niece, Carolyn Adams; and my niece, Cassandra Bouie. Several friends: Attorney Sheila Slocum Hollis, who is here in the front row, from Duane Morris; the general counsel of the Commercial Law Development Program, a part of the Commerce Department, Steve Gardner, who is here; Attorney Marie-Flore Kouame from the CCIPS Unit of the Department of Justice; and other members

of that staff: Katrina Osonovo, Elise Yobikoff, and the senior attorney, Namde Azero.

I also have other friends: Attorney Mary Smith, Attorney Don Bivens, Attorney Shelly Hayes, Attorney Larry Miller, Matt Surego; Marilyn Queen from the Federal Judicial Center; a former law clerk, Alicia Black; and Attorney Ashley Sills, along with the former Special Agent in Charge of the Federal Bureau of Investigations from Memphis, Attorney My Harris, and her daughter, Robbie Harris. And also Attorney Charlotte Collins is present, and especially my former law clerk who is now a magistrate judge, Charmiane Claxton, is here today, and I am so grateful. And, obviously, a number of my clerks and former clerks are watching this on TV, and I acknowledge the great help of my immediate staff—Tyler Brooks, Janica White, and Stevie Phillips.

Thank you.

Senator SCHUMER. Well, thank you, Judge Donald. That is a lot of people to stand up, but would all of you who were introduced please stand so we may acknowledge and welcome you. Thank you all for being here.

Judge DONALD. Thank you. And I saw my niece, Cassandra Bouie, who is back in the back.

Senator SCHUMER. Welcome to Ms. Cassandra Bouie as well. OK. No more, no less than all the others.

I have a few questions for you, Judge. You have been a United States district court judge for 16 years. Many of my colleagues on this Committee have expressed concern about the lack of courtroom experience of some of our appellate nominees, but clearly you make the grade. You have a lot of experience. Why do you want to be a court of appeals judge? And what do you think your having been a district judge will allow you to bring to the table?

STATEMENT OF HON. BERNICE BOUIE DONALD, NOMINEE TO BE CIRCUIT JUDGE FOR THE SIXTH CIRCUIT

Judge DONALD. Mr. Chair, thank you so very much for that question.

I have served as a trial judge for 28 1/2 years, 16 of those on the district court, and in that time I have had an opportunity to see litigation up close and make the critical decisions about facts coming before the court. I have had the opportunity to apply settled principles of law, and I have had the opportunity to watch the drama of trials unfold.

I think that I bring a particular degree of experience by virtue of having had those 28 years of seeing trials play out, and now at this point I believe that that experience can help inform decisions that I would make as an appellate court judge. I think that is an important perspective.

Senator SCHUMER. Thank you.

Now, Judge Donald, in a number of speeches over the years, you have referred to the need to be conscious of one's own race and the perspective that race gives each of us, as well as the need to be aware of other people's racial experiences. One report characterized you as having said that you apply "a vastly different" standard than your white counterparts in discrimination cases. Could you please clarify your remarks? And have you ever or would you ever apply a legal standard to a case that is dictated by anything other than the rule of law?

Judge DONALD. Thank you for that opportunity to clarify, Mr. Chair. I would certainly never apply a different standard in deciding a summary judgment or any other cases. My goal as a judge is always to apply the law, to look to existing precedents, and to decide the facts before me free from bias, prejudice, or partiality. That statement was taken out of context. It was in a panel that I participated on in an American Bar Foundation program, and that particular comment was related to a particular case that I worked on when I sat by designation at the court of appeals. And I was speaking to how my experience allowed me to bring a different and diverse perspective to an assessment of the facts in that case. But I would always apply precedent and settled principles of law. I believe that a judge has to leave race and other personal philosophies at the door.

Senator SCHUMER. Thank you. I think that does clarify that very well.

Next, you decided a case called *Robinson v. Shelby County Board of Education*. That was a 40-year-long case that involved a complex set of circumstances regarding school desegregation. In that case, when the parties came before you to ask that the consent decree be dissolved, you granted their request as to significant areas: facilities, transportation, and staffing. You denied it as to others.

Your lengthy fact-bound decision was overturned in a closely divided 2–1 decision by the Sixth Circuit. After the Sixth Circuit’s decision, did you have any hesitation at all in complying with that decision? And would you in future cases have any trouble complying with existing law in any way?

Judge DONALD. Senator Schumer, I would never have any problems complying with existing law. Indeed, in that case my effort was to comply with existing settled principles of law. You are right, that was a case that was filed in the courts when I was 12 years old. It came to me—it was as class action case. It came to me on a motion to dismiss and declare the school system unitary, declare that all vestiges of discrimination have now been removed. In a class action case, under Rule 23 of the Federal Rules of Procedure, I have a duty as a judge to conduct a fairness hearing, and in conducting that fairness hearing, I am obliged to apply in a school desegregation case the green factors to make certain that there has been compliance with Supreme Court law. And you are right, I found that Shelby County had made tremendous progress in three of those areas, but in other areas they had not made such progress.

I also have to look at whether or not there has been good-faith compliance with all of the orders of the court, and based upon an assessment of the law applied to those facts, I found that in three areas unitary status had been earned and three others had not.

And, of course, when the Sixth Circuit issued their ruling, I promptly complied and dismissed the case.

Senator SCHUMER. OK. So thank you, Judge Donald. That completes my time for questioning. I thank you for being here, and I thank all of your relatives, friends, law clerks, nieces, and everyone else who came.

Judge DONALD. Thank you. Mr. Chair, may I and my friends be excused?

Senator SCHUMER. Please.
Judge DONALD. Thank you.

CHRISTOPHER DRONEY
WEDNESDAY, JUNE 22, 2011
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:35 p.m., Room 226,
Dirksen Senate Office Building, Hon. Richard Blumenthal presiding.
Present: Senators Whitehouse and Grassley.

OPENING STATEMENT OF HON. RICHARD BLUMENTHAL, A U.S.
SENATOR FROM THE STATE OF CONNECTICUT

Senator BLUMENTHAL. Good afternoon. I am pleased to call to
order this nominations hearing. I want to thank my colleagues for
being here, and everyone who is attending this hearing of the Senate
Judiciary Committee.

I am grateful to Chairman Leahy for giving me this opportunity
to preside this afternoon and to Senator Grassley, the Ranking
Member, for being here with us. And I know that I am joined by
Senator Grassley in the strong feeling that we have an obligation
to move forward and advance this nominations process in the Senate,
and I am encouraged by the spirit of bipartisanship that I have
seen in my short time on the Judiciary Committee and in the U.S.
Senate.

And, obviously, we are responding to very widely and strongly
felt feelings on the part of the American public that they want us
to work together in a bipartisan spirit to advance the Nation, to
create jobs, and to make sure that our justice system works efficiently.
There are still over 90 Federal judicial vacancies and nearly half
of those vacancies have been declared judicial emergencies. And I
am very pleased that this afternoon we will take another step toward
filling some of those vacancies with some very distinguished
nominees.

I hope that we will be joined by other of my colleagues on the
Judiciary Committee. But in the meantime, I would like to yield to
the Ranking Member, Senator Grassley, for any remarks he may
have.

STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR
FROM THE STATE OF IOWA

Senator GRASSLEY. I, of course, welcome all of the nominees who
are coming before the committee, and particularly know that their
family and friends are proud of them.

As I mentioned at our last nomination hearing, this is an important
event for the nominees, as well as for the institution and for
the public. The nominations before us today illustrate the critical
role of the constitutional advice and consent function of our Senate.
This Committee previously reviewed the qualifications of a nominee
to the seat to which Judge Droney is now nominated. The Committee
found that nomination to be lacking and returned it to the
President without final action.

We have arrived at the point where we can now consider the
nominations. I look forward to the testimony of the people before
us. So I will have questions.

I have a much longer statement that talks about each nominee
but I am not going to read it. I am going to put it in the record.

And I would ask that the nominees read what I had to say about them.

Senator BLUMENTHAL. Without objection, that statement will be in the record.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Senator BLUMENTHAL. And we are going to proceed from Senator Lieberman onward in introductions. But let me just say that we are going to welcome, first—and he will introduce him—Judge Christopher Droney, who has been nominated to be a judge on the Court of Appeals for the Second Circuit. He is from the State of Connecticut and he has served on the United States District Court for the District of Connecticut for 14 years.

So with that, Senator Lieberman, the floor is yours.

PRESENTATION OF CHRISTOPHER DRONEY, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE SECOND CIRCUIT BY HON. JOSEPH LIEBERMAN, A U.S. SENATOR FROM THE STATE OF CONNECTICUT

Senator LIEBERMAN. Thank you very much, Chairman Blumenthal. It is an honor to be here to introduce Judge Droney to the committee, Senator Grassley.

I must say it is a special personal pleasure to see you, Senator Blumenthal, chairing this hearing.

It really is a personal thrill for me to be able to introduce Judge Droney to the Committee as a nominee for the second circuit court.

I have known Chris Droney and his family for a long time.

Let me just say, by way of introduction, that his wife, Liz, and his three daughters, Sarah, Emily and Katherine, are here, and they are the best argument for voting to confirm Chris Droney, even though he has an extraordinary record.

I first came to know Chris when he was a private attorney in the Hartford area and involved in West Hartford town government as a member of the town council and then ultimately as mayor. In 1993, President Clinton nominated Chris to be our U.S. Attorney in Connecticut.

Incidentally, we were both remembering, when I had the honor of swearing him in as U.S. Attorney in the fall of 1993, he was holding one of his daughters in his hand. This would be hard to do today.

We have come a long ways, and Chris did a great job as U.S. Attorney for the 4 years he served in that capacity, initiating cooperative law enforcement efforts against gangs, health care fraud and financial fraud investigations, and trying some major cases in Connecticut and across New England, including some successful arguments before the United States Second Circuit Court of Appeals.

In 1997, President Clinton nominated Chris Droney to be a member of the district court in Connecticut. I remember saying, when I had the honor to introduce him that day before this committee, that I hoped that I would—that Chris was young enough and I hoped that I would serve long enough in the U.S. Senate that I would be able to return when he was nominated for a higher court, because I felt sure that his service on the district court would justify that nomination.

You can see what I meant when I said that it is a real personal

thrill to be here today to actually introduce him.

He has served with great distinction for 13 years as a member of the district bench, presiding over hundreds of Federal, civil and criminal trials. He has a profound commitment to the rule of law, widespread respect he enjoys among lawyers practicing in the Federal courts.

To my way of thinking, he is just a mainstream, bright, sensible jurist. In fact, during his 13 years as a district judge, Judge Droney has served on second circuit panels a number of times and actually written opinions for the second circuit court on topics as varied as antitrust law, criminal procedure, and Federal labor law.

So this is a person of great character, hard work, and a real love for the law. He has shown that as U.S. Attorney, as a district judge, and I am confident, with the support of this Committee and our colleagues in the Senate, that he will do the same on the second circuit court.

Actually, his nomination was unanimously confirmed by the Senate in 1997 to the district court. That does not happen much anymore, but since Leon Panetta was confirmed 100–0 the other day, I want to say that I hope we can do the same for Chris Droney when he comes before the Senate.

With that, I introduce him to this honorable committee. Thank you, Mr. Chairman.

Senator BLUMENTHAL. Thank you, Senator Lieberman.

I might just explain to the folks who are visiting that Senators often have other obligations, cannot stay for the whole hearing. So we thank you for being here and for making this hearing informed about the unique perspectives that you bring to each of these nominees. I am going to ask Senator Whitehouse to comment. He is a member of this Committee and he may not be able to stay himself for the full hearing, but I think he wants to make some remarks about one of the nominees.

PRESENTATION OF CHRISTOPHER DRONEY, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE SECOND CIRCUIT BY HON. SHELDON WHITEHOUSE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator WHITEHOUSE. I cannot stay, but I appreciate both your courtesy, Mr. Chairman, and the Ranking Member's courtesy, Senator Grassley's courtesy, in allowing me just to say a brief word.

I know that as the chief law enforcement officer for your home State of Connecticut for many, many years and a very distinguished practitioner who I think probably has more Supreme Court arguments than anybody in the Senate does, you are keenly aware of the talents that Chris Droney brings to the table.

I just wanted to share briefly that he and I were United States Attorneys together. In the world of 93 United States Attorneys, there is a certain amount of sort of jockeying and prestige and trying to sort out——

Senator BLUMENTHAL. I would not know that.

Senator WHITEHOUSE [continuing]. Trying to sort out who the really superstar ones are and all of that. And not only did I have a very high regard for Chris Droney during his time as United States Attorney, but I believe that all of his colleagues did. He was seen as one of the finest of the U.S. Attorneys, and that is a pretty

competitive crowd.

So I just wanted to stop by briefly to wish him well, to hope that his process is uncontroversial and smooth, and, of course, if there is anything that I can do to assist with any of my colleagues in trying to understand how good a nominee he is, to see to it that they agree that he should be noncontroversial, I am all in for that.

He is a very good lawyer, he has been a great U.S. Attorney, and I look forward to his smooth confirmation.

Thank you, Mr. Chairman. And I thank the Ranking Member, also.

Senator BLUMENTHAL. Thank you, Senator Whitehouse. And let me say that I bring a little bit of the same perspective, having been United States Attorney in Connecticut for 4.5 years before I was Attorney General, and I have worked with Judge Droney both as a United States Attorney, when he served in that position, and then later as a judge when my office—and I personally had cases before him.

So today is a day of particular pride for me as a citizen of Connecticut, as a public official, as well as a member of the bar in Connecticut, a former prosecutor, and now a Senator, to be presiding.

Judge Droney brings to this nomination a really rare, if not unique set of qualifications and experience. Having been a prosecutor, as well as a private practitioner, and a citizen involved in his community, speaking to some of the qualifications that Senator Lieberman mentioned in his very able opening remarks.

I had occasion to work with Judge Droney when he was United States Attorney on some of the most challenging and difficult cases and observed those cases that he had. He was particularly successful in prosecuting street gangs. He presided in an office that pursued more than 150 gang-related convictions, securing very significant sentences and other results. And he succeeded in coordinating state, local and Federal prosecutorial and law enforcement officials to crack down on street crime and organized crime, deterring that kind of activity, as well as prosecuting it.

He served as a member of the United States District Court for the District of Connecticut for 14 years and, in that capacity, presided over more than 3,000 civil cases and nearly 400 criminal cases, and he had very significant experience on the court of appeals to which he has now been nominated, where he served as a visiting judge on more than 50 appeals.

He has written more than 700 opinions, including six while sitting by designation on the second circuit. I might say by way of qualification, or disqualification, he has presided as a judge over a number of arguments and cases that my office had before him as an attorney general, and we won some and we lost some, but we always had extraordinary and deep respect for the scholarship and judgment that Judge Droney brought to those cases.

He has also been involved in his community, very significantly in the Science Museum of Connecticut, St. Francis Hospital and Medical Center, the American Cancer Society's Connecticut chapter, and he has received numerous awards.

These distinctions are all in the record and I am not going to go over them in great detail, but I might just mention for the record that the ABA standing Committee on the Federal Judiciary unanimously

rated Judge Droney well qualified, which is its highest ranking.

He is accompanied today by his family, which, as Senator Lieberman mentioned, is one of his major, I think, distinctions. His wife, Elizabeth, and his daughters, Emily, Sarah and Katherine. And I might just say to the families of all the nominees—I know Judge Droney personally, I do not know the others—but you should all be very, very proud of the family members who are before this committee. They have served with tremendous distinction and great dedication as public servants to this point in their lives and whatever the outcome before the U.S. Senate, you should be very, very proud of what they have done for this Nation.

So having said that, I am going to ask Judge Droney to please take the witness stand, and we will give you the opportunity to make an opening statement; first, to be sworn and then to make an opening statement.

[Nominee sworn.]

Senator BLUMENTHAL. Thank you. Please be seated. And if you would like to make an opening statement, please feel free.

STATEMENT OF HON. CHRISTOPHER DRONEY, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE SECOND CIRCUIT

Judge DRONEY. Thank you, Mr. Chairman. I do not have an opening statement to make. I would like to thank the Committee for having the hearing.

Senator BLUMENTHAL. Please turn on your microphone. Thank you.

Judge DRONEY. Thank you, Mr. Chairman. I would like to thank, first, the Committee for having the hearing. I would like to thank you, Senator Whitehouse and Senator Lieberman for their very kind words today and their comments earlier.

I do not know if it is necessary to introduce my family again, but I will. My wife, Liz, is here and my daughters, Sarah, who is studying for the Connecticut bar is here. Emily is a registered nurse in Hartford, she is also here. And then Katherine, my youngest, just finished her freshman year in college.

So I know that they are very proud and happy to be here, as well.

And I am happy to answer any questions you might have.

[The biographical information follows.]

Senator BLUMENTHAL. Thank you. I will begin with some questions and then ask Senator Grassley whether he has any.

One aspect of your background that has not been mentioned and I should have made reference to it has been your service as the deputy mayor and then mayor of West Hartford. And I wonder if that experience, combined with your prosecutorial and your judicial experience, has given you a perspective on what you will be doing as a judge on the second circuit, if confirmed.

Judge DRONEY. I think it was very important experience for me in all the different roles that I've had. I think service in local government like that teaches you to be fair to people, to be patient, to listen to everybody, and to, also, understand that just because someone is better educated than someone else doesn't mean that person is more intelligent than the one who hasn't the benefits of a great education like I have.

I hope I have brought those qualities to my other positions, too, as U.S. Attorney and as a trial judge.

Senator BLUMENTHAL. And how would you describe your view of the role of precedent or decisions by higher courts in what you do as a judge?

Judge DRONEY. Well, I certainly follow precedent, I'm bound to it, of the Supreme Court and the second circuit. I hope and I think that I have demonstrated that over my 14 years as a district judge, that my own personal views have no place in adjudicating those cases and I am bound by those decisions of the higher courts.

Senator BLUMENTHAL. I am happy to turn to the Ranking Member, Senator Grassley.

Senator GRASSLEY. First of all, congratulations.

Judge DRONEY. Thank you, Senator.

Senator GRASSLEY. I should say you are lucky you earned it, but all these nice comments about you.

When you served as U.S. Attorney in Connecticut, the New York Times quoted you as saying, "I believe in redemption, but I also believe in paying for your sins."

Has your time on the Federal bench changed your views you originally held as a U.S. Attorney and if so, how?

Judge DRONEY. I don't think so. I think certainly there is a role for punishment. It's one of the things we think about in applying the Federal sentencing statute. I think it was appropriate in that particular case. It was a gang member who was sentenced to prison and he was arguing in that article that he shouldn't have received a sentence of imprisonment.

But I had hoped that he turned his life around and was going to return as a contributing member of society, but he also, I think, had to pay for some of the misdeeds that he had as a member of the Los Solidos.

I still believe—I still believe generally in those principles that I articulated in that article.

Senator GRASSLEY. One, I ask the next question because of your position as a district judge and it is in regard to the issue of terrorism, and I only want to quote Attorney General Holder, because he has a very good quote about Article 3, court system, "our most effective terror-fighting weapon."

What is your reaction to the statement, based on your experience as an Article 3 judge? Is this a burden the Attorney General should put on our court, and what do you think the court's proper role would be in the war on terror?

Judge DRONEY. Well, I think it's for people than I to decide where those cases should be placed. I know it has received a lot of attention, even this week, about whether they should be tried in military tribunals or in the district court.

All I can say is if I have one of those cases, I would certainly adjudicate it and follow the law. But I think as to the decision as to where is the proper forum, I don't think that's something that at least I have encountered.

It's possible, I think, that it could come before me, but I think that it's a prosecutorial decision rather than a judicial decision typically and the Attorney General would make that call, I believe.

Senator GRASSLEY. In your questionnaire, when you were nominated

for district judge, you said that judges should use, “traditional methods of legislative interpretation when defining the intent behind certain laws and their scope.”

What specifically do you consider—let me go to my second question.

There has been renewed interest in textualism, including criticism of the use of legislative history and statutory interpretation.

How does this approach fit into your view of traditional methods of legislative interpretation?

Judge DRONEY. Well, I think my views are the same now as they were 14 years ago when I provided that answer to you. I think it was to you, Senator. And it is that, of course, the first thing that we should look to is the language of the statute or the Constitution itself and try to be guided by that.

Second, we do—I still think it is appropriate to look at legislative history. At times, it’s hard to figure it out, but it’s our obligation to do our best to see what the legislature intended in passing that statute. And then, finally, of course, the decisions of the higher courts in interpreting the statute, they should be of some guidance, too, and, as I mentioned before, are binding, if it’s a precedent that’s right on point.

Senator GRASSLEY. Now, you have been a judge for 14 years. And if confirmed to the second circuit, how would your approach to judging change and, specifically, do you think that this will be a difficult transition for you to make?

Judge DRONEY. I don’t think my approach will change. As Senator Blumenthal, as the Chairman has pointed out, I have sat on the second circuit eight times in my time as a district judge by invitation. So I have, I think, a pretty good idea of how the court works. I still, of course, have a lot to learn, but I still think I’d be guided by the same principles.

And, also, as I think either Senator Blumenthal or Senator Lieberman pointed out, I’ve written, I think, over 700 opinions and, as you well know, the job of a district judge is not just to try cases and preside over court hearings, but also to write a lot, and I have done that.

So I think I’ve had a lot of experience in that and, as I’ve mentioned, I still think I have some to learn, but I think I’m very well prepared for that, if I’m fortunate enough to be confirmed.

Senator GRASSLEY. Here is kind of a philosophical approach to how you might judge, and I am going to quote President Obama. He has said that he hopes judges would reach decisions based on, “a broader vision of what America should be.”

Do you believe judges should consider, “their broader vision of what America should be” when deciding cases?

Judge DRONEY. Well, I certainly don’t think my personal views should be involved in deciding cases. As I’ve mentioned, I do strongly believe that the decisions of the higher courts should bind the lower courts, and I think I’ve demonstrated over the 14 years that I’ve followed those rules, and that’s the way I’ve approached my judging, without—I hope and I think, without having my personal views come into play.

Senator GRASSLEY. This will be the last question, but I might submit some for answer in writing.

We recently had *Brown v. Plata*, the case about the 30,000 prisoners

from California prisons. Judge Scalia dissented, and you do not have to comment on what he said, but it is kind of a basis for my question, that gets to a broader question, in writing about these types of injunctions, that it turned judges into, “long-term administrators of complex social institutions, such as schools, prisons and police departments, requiring judges to play a role essentially indistinguishable from the role ordinarily played by executive officials.”

Do you believe that structural injunctions like this are consistent with the judicial power called for in Article 3 in the U.S. Constitution?

Judge DRONEY. Well, I know the Supreme Court has recently, not just in that California case, but in the last 10 years or so, has reminded all of us that it’s better to have those big organizations run by state agencies, because they are better equipped than a district judge to do that, and I firmly believe in that.

But I also, from the Supreme Court decision, know that there are times when the constitutional violations are such that the courts have to intervene and we shouldn’t shy away from that. But I do agree that, generally speaking, those agencies, those departments are better served by a state agency running them. They are better equipped to do that.

Senator GRASSLEY. Thank you, Judge Droney.

Judge DRONEY. Thank you, Senator.

Senator BLUMENTHAL. Thank you, Senator Grassley.

There are no other members here, but we really want to thank you very much for being here to testify. And we will turn now to the next panel. Thank you.

Judge DRONEY. Thank you very much.

HENRY FLOYD
WEDNESDAY, APRIL 13, 2011
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 3:02 p.m., Room SD-226, Dirksen Senate Office Building, Hon. Al Franken, presiding.
Present: Senators Durbin, Grassley, and Graham.

OPENING STATEMENT OF HON. AL FRANKEN, A U.S. SENATOR
FROM THE STATE OF MINNESOTA

Senator FRANKEN. This hearing is called to order.

Before we begin, I would like to welcome all of you here today to the Senate Judiciary Committee. Providing the President our advice and consent on judicial and executive nominations is one of the most important jobs we have as Senators, and it is a special responsibility for the Judiciary Committee.

Today we will consider five nominations: Judge Henry F. Floyd, for United States Circuit Judge for the Fourth Circuit; Lisa O. Monaco, for the Assistant Attorney General of the Department of Justice's National Security Division; Judge Nelva G. Ramos, for United States District Judge for the Southern District of Texas; Judge Richard B. Jackson, for United States District Judge for the District of Colorado; Sara L. Darrow, for United States District Judge for the Central District of Illinois.

We are fortunate to have some of the nominees' home State Senators and Representatives here to introduce them, and we will turn to them shortly.

But before we do, I will turn the floor over to my friend, the Ranking Member, Senator Grassley, for his opening remarks.

STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR
FROM THE STATE OF IOWA

Senator GRASSLEY. Thank you, Mr. Chairman.

We have a nominee to be a Circuit Judge, and three to be District Court Judges.

In addition, we are considering four judicial nominees. Henry Floyd, sitting U.S. District Judge in South Carolina, is nominated to be U.S. Circuit Judge.

We have already confirmed four of the President's nominees to the fourth circuit. This is as many as were confirmed to that Circuit during the two terms of President Bush. I would note that eight of President Bush's nominees to the Fourth Circuit were returned to the President, receiving no up or down vote by the Senate.

Mr. Chairman, I will not repeat the biographical information of our nominees. I commend each of them for their prior public service and for their willingness to continue in public service.

I ask unanimous consent that the balance of my statement be put in the record.

Senator FRANKEN. Without objection.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Senator FRANKEN. Thank you, Senator Grassley.

As I said, we are fortunate to have some of these nominees' home State Senators, and I think, in the case of Judge Floyd, perhaps

Representative Clyburn will be coming.

And now I turn to my colleague from South Carolina, Senator Graham.

PRESENTATION OF HENRY F. FLOYD, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE FOURTH CIRCUIT, PRESENTED BY HON. LINDSEY GRAHAM, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator GRAHAM. Thank you, Mr. Chairman.

It is my pleasure today to introduce to the Committee Judge Henry Floyd. I have known Henry for a very long time. We practiced law together in adjacent counties. He has been a state court judge and a Federal judge for over 18 years. He was appointed to the Federal bench by President Bush.

Representative Clyburn will be coming over from the House in a bit to attest to the fact that Republicans and Democrats, independents, libertarians, vegetarians, we all have a common view of Judge Floyd and we believe he has got the best temperament of anybody in South Carolina. And that is saying a lot, because we have pretty patient people down there.

He has a tremendous background of being a trial judge. He has been a litigator. He served in the State House. He has got a terrific background, I think, to administer justice at the Federal level. He was rated well qualified by the ABA. And I am just proud to see this day come. It has been a long time in the making, and I know, Henry, you will do a great job for the Fourth Circuit and the people of this part of the United States, and I look forward to getting you confirmed.

And it is an odd situation where I am nominating someone and putting holds on all the judges at the same time. Nothing personal to these judges. We have got a problem in Charleston that I will share with you later, and I am going to leave here to talk about a situation with our port.

But I hope, Mr. Chairman and to my colleagues, that this will end quickly. This is a huge deal for the State of South Carolina in terms of our economic future. And all of these judges reflect the best in America when it comes to the law, and Henry Floyd is a judge's judge, a person every lawyer who has been before has nothing but praise. And I know you will administer justice fairly at the Circuit Court level, and I very much appreciate President Obama nominating you. This is something he did not have to do, but he chose to do.

And when it comes to Representative Clyburn coming over from the House, it speaks volumes about you, Henry, as a person. So thank you very much.

Senator FRANKEN. Thank you, Senator, and thanks for your patience, and I know you have to go. And we will hope that Representative Clyburn does make it.

We would like to welcome, from the House of Representatives, to speak on behalf of Judge Floyd and speak to the bipartisan support for Judge Floyd, our colleague, Representative Clyburn. Thank you for joining us.

PRESENTATION OF HENRY F. FLOYD, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE FOURTH CIRCUIT, PRSENTED BY HON. JAMES E. CLYBURN, A REPRESENTATIVE IN CONGRESS

FROM THE STATE OF SOUTH CAROLINA

Representative CLYBURN. Thank you very much, Mr. Chairman. Mr. Chairman, Senator Grassley, Senator Durbin, I want to thank you all so much for allowing me to appear here today on behalf of a long-time friend, Judge Floyd.

I was thinking, as I was searching this junk on my desk trying to find the remarks that were prepared for me today, what will I say without them. Well, I am without them. So I am going to tell you what I know about Judge Floyd.

I first met Judge Floyd when I was running a state agency in South Carolina, an agency to which I was appointed by then Governor John West, an agency that was created to respond to the times within which we lived coming out of the 1960s and the early 1970s.

As you might imagine, Mr. Chairman, in those days, things were quite contentious in South Carolina and in the early days of that agency, I was not the first director of it, it got in significant difficulty and the legislature was moving to defund the agency and eliminate it. And I was asked by Governor West to go to that agency and try to see what we could do to turn it around.

I started looking for legislators that I could sit down with and could get to understand exactly what it was that we were trying to do in order to continue to move our state forward.

In that search, I came upon Henry Floyd, a young legislator from Pickens County, and when I looked into his background, I was able, through those meetings, to forgive him because of his northern roots, having been born in North Carolina. His parents moved to Pickens County when he was a very young boy.

He, I noticed, had graduated from Wofford College in Spartanburg, a United Methodist affiliated school, whose board of trustees I was one time a member of.

I know that we all talk about judges being prepared, well prepared for their work, and I think that all of you have his background before you and I need not go into that.

What may not be shown on that paper that you have is the temperament of Henry Floyd. I can tell you without question that no one has ever been considered for a judgeship, no one has ever served in a judgeship that has demonstrated the kind of judicial temperament that you will find in Judge Henry Floyd. And I am so pleased to be here today to be a part of hopefully elevating him to the Fourth Circuit Court of Appeals.

I do believe that he would make not just all South Carolinians, but all Americans proud.

So thank you so much for allowing me to be here on his behalf today, and I wish him Godspeed, and each one of you the same throughout your deliberations.

Thank you so much.

Senator FRANKEN. Thank you, Representative Clyburn, for joining us here in the Senate.

And with that, I will introduce Judge Floyd and swear him in.

So if, Judge Floyd, you would come forward, after that very eloquent introduction. You can remain standing.

[Nominee sworn.]

Senator FRANKEN. Thank you. You may be seated.

Judge Floyd, as is our tradition, please feel free to introduce any members of your family or friends that are here with you today.
STATEMENT OF HON. HENRY F. FLOYD, NOMINEE TO BE UNITED STATES CIRCUIT JUDGE FOR THE FOURTH CIRCUIT
Judge FLOYD. Thank you, Mr. Chairman.

I have with me my wife, Dr. Libba Floyd; my good friend, Scott Dover; my mother, Margaret Floyd; my daughter, Betts Copenhaver, who is the mother of our two grandchildren; and, then, the president-elect of the South Carolina Bar, Marvin Quattlebaum, appeared here today. I didn't know he was coming, but he's in the audience today, as well.

Senator FRANKEN. Welcome to all of you and congratulations to all of you.

Judge Floyd, you are in the unique position of having served as both a judge and as an elected official in the South Carolina State Legislature, a special position—I am sure someone else has done that before.

Should you be confirmed, how do you think that your time serving in the legislature will help you interpret the laws that we write?

Judge FLOYD. Thank you, Mr. Chairman, for that question, and Senator Grassley.

I was elected to the legislature when I was in law school. And so I got to spend a lot of time working with the Judiciary Committee, which, at that time, drafted most of the legislation that was considered by the House, except for budget.

And so I got a real good lesson in how to put statutes together, how to interpret them, what the pitfalls could be. So I think my legislative experience would greatly assist me in the area of statutory construction and interpretation.

Senator FRANKEN. You currently are a district court judge. How do you think your job will change if you are confirmed for a position in the court of appeals?

Judge FLOYD. Well, I think—Senator, thank you for that question. I think that we still do a lot of writing and research at the district court level, particularly on the civil side. So it's nothing new to me in that regard.

I would tell you that I've also set a designation at the Fourth Circuit some 50 to 60 times. So I'm familiar with the process and how it works, and I think the transition would be very easy for me.

Senator FRANKEN. You were at the center of some very important national security cases a few years ago; for instance, the Padilla and Almarri cases. Can you tell us about those cases and your role in them?

Judge FLOYD. Thank you, Senator. The Padilla case came to me by way of a Supreme Court opinion that said that the case had to be tried in the district of South Carolina. And so he was in-house at the brig in South Carolina.

So I got the case and the issue was whether or not the President had the right to detain an American citizen who was arrested on American soil. I ruled that he did not have that authority. And then the Fourth Circuit unanimously reversed me on that case. And then a few days before the cert briefs were due in the Supreme Court, the government changed its mind and decided to

charge Jose Padilla as a citizen and they tried him in Florida. The Almarri case is a little different set of facts. He likewise was in the brig at Charleston. He came into the country the night before 9/11. The evidence in the case led me to conclude that under those facts and circumstances, that the President had a right to detain Almarri because there was a sudden—there was somewhat of a sudden emergency had he gone on about what he had plotted to do.

That went up on appeal and, again, I got reversed by the Fourth Circuit. Again, just days before the Supreme Court was to see the briefs on the court, again, the government changed its mind and charged him as a citizen and—civilian—and tried him, I think, in Illinois, Senator Durbin.

The order in that case, my order, is still a valid order in that the Supreme Court has vacated the Fourth Circuit's opinion. So the right of detention is still there.

Senator FRANKEN. So the Supreme Court never ruled on the issues in that case then.

Judge FLOYD. They never got to it, initially on jurisdictional grounds.

Senator FRANKEN. I understand that you were one of the first judges in the country to address the admissibility of—and I hope I pronounce this right—mitochondrial?

Judge FLOYD. Mitochondrial DNA, Senator?

Senator FRANKEN. Yes.

Judge FLOYD. Yes, sir.

Senator FRANKEN. Yes. DNA is the pronunciation I knew I could get right. And you ruled that such evidence was admissible, which the South Carolina Supreme Court affirmed. I have worked hard here in the Senate to make sure that DNA evidence is collected and tested in a timely way so that justice can be served for victims of crime.

Can you tell me a little bit about your experiences with DNA evidence in your courtroom?

Judge FLOYD. Thank you, Senator, for that question. Specifically on mitochondrial or DNA in general? In general?

Senator FRANKEN. In general.

Judge FLOYD. All right. Well mitochondrial DNA is derived from the mother of the person. It can be a very, very, very small sample. In this case, it was a murder case, with the death penalty pending. The FBI came in and testified. It was only the second time in the United States that mitochondrial DNA evidence was admitted, and we went through a long process, something akin to the Daubert analysis in Federal court. But ultimately, it was admitted. DNA evidence is quite frequently used, particularly in the state court, because there are so many criminal cases tried there. I have had—I have not had a bad experience with it and we've been—and we've had a good chain of custody and all that kind of stuff. So it's a very valuable tool for both sides.

Senator FRANKEN. Thank you, Judge.

And I would turn to the Ranking Member.

Senator GRASSLEY. I do not know whether I need to ask you any questions. If you have got the two Senators from South Carolina on your side, you have got a couple tough cookies backing you.

But let me do my job, because we want to make sure that people that interpret the law as opposed to make the law get on our courts.

And I was going to ask you about Padilla, so I will not go into that anymore. But you were a state court judge for 11 years, having been a District Court Judge now for 7 years, presided over hundreds of cases and even sat as designation on the Fourth Circuit.

I am going to use, for my first question, Professor Liu, who was before our Committee a couple—well, maybe a month ago now for a hearing, and his nomination is on the Senate floor.

But as a professor, he wrote at the moment of decision should determine whether a society's, "collective values on a given issue," have converged to a degree that they could be persuasively crystallized and absorbed into legal doctrine.

What I am asking is for you to answer, is it appropriate for a judge to consider, "our collective values on a given issue," when interpreting the Constitution, a Federal statute, or deciding case or controversy?

Judge FLOYD. Thank you for the question, Senator Grassley. I am not familiar with the nominee or any of his writings, and I really don't know what content that particular quotation came from. So I'm really not in a position to evaluate that.

Senator GRASSLEY. All right. If confirmed as a Circuit Judge, what weight would you give to public values and social understandings in deciding cases, analyzing Federal statutes, or interpreting the Constitution?

Judge FLOYD. Thank you, sir, for that question.

My position has always been, as a trial judge, both at the state and Federal level, is that, as simple as it sounds, I try to determine what the facts are and do that fairly and impartially and to those facts, I apply the law, as I understand it to be.

There is a lot of precedent out there and I understand that and do follow precedent, when it exists. So that may seem a little narrow, but that's the way that I do things.

Senator GRASSLEY. Do you think the Constitution should be interpreted in ways that adapt its principles and its text to the challenges and conditions of our society? And if you thought so, how would you go about accomplishing that?

Judge FLOYD. Thank you again for that question. I don't believe that I would go about interpreting in that way, but I understand your question.

Senator GRASSLEY. I think you have answered my question. I would like you to think about the most difficult case you have had to decide as a Federal judge. In deciding that case, did you resort to things that you might call your own personal values, your core concerns, broader perspectives of how the world might work or the depth and breadth of your empathy? And those are words that might sound familiar to you, because they come from the empathy standard discussed by President Obama on several occasions.

Judge FLOYD. So you want me to talk about the concept of empathy.

Senator GRASSLEY. Well, how you would use that, whether you look at cases that way.

Judge FLOYD. No. Again, the way I answered your other question, you look at the facts, you determine them fairly and impartially,

and you apply the law, and that's essentially what I do.

Senator GRASSLEY. Thank you very much.

Senator FRANKEN. Senator Durbin.

Senator DURBIN. Thank you very much, Judge Floyd, for being here. And like my colleagues, I am impressed by the fact that you had the support of both Republican Senators and my close friend, Congressman Clyburn, speaks well of your background and balance and reputation as a jurist.

You have been involved in a number of things which have been questioned here. There is one I would like to ask about. We had a former colleague from the Commonwealth of Pennsylvania, Arlen Specter, and his last request of us as he left this Judiciary Committee, which he once chaired, was that we take up that issue which he addressed with great passion of televising court proceedings. And it turns out that in your background, you were a state court judge and presided over the case of State v. Beckham, a prominent murder case that resulted in a life sentence for the defendant. The entire 3-week trial was televised live in Court TV.

So, Judge Floyd, what is your view on televising court proceedings and whether they would be appropriate in Federal court?

Judge FLOYD. Well, let me answer this way, from the state court experience. The Supreme Court gave us discretion to have proceedings televised. I personally, as a state court judge, did not have any problems with Court TV, for example, being in the courtroom. Everything went smoothly. And as you've noted, it was a 3-week trial. It wasn't the only trial where I had TV or cameras in. But it didn't bother me in state court.

But to answer your question, at the Federal level, that's really not my call. I think that's up to the Supreme Court or perhaps Congress.

Senator DURBIN. What was your observation on its impact on witnesses or even the conduct of counsel?

Judge FLOYD. Senator, with me personally, I run a pretty tight courtroom and I have not had problems. But I am aware that other judges have had problems with counsel playing for the cameras. Lots of times, the public can be misled by a snippet on the news and get the wrong idea about what's going on in the case. So that's one of the pitfalls of having cameras in the courtroom. But, again, I had a good experience. I never got burned by it.

Senator DURBIN. Thanks very much, Judge Floyd.

Thank you, Mr. Chairman.

Senator FRANKEN. Thank you. And thank you, Judge Floyd.

Thank you for your testimony.

Judge FLOYD. Thank you. May I be excused?

Senator FRANKEN. Yes.

[Laughter.]

JAMES GRAVES
WEDNESDAY, SEPTEMBER 29, 2010
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Committee met, pursuant to notice, at 2:03 p.m., SD–Room 226, Dirksen Senate Office Building, Hon. Al Franken, presiding. Present: Senators Whitehouse, Franken, Sessions, and Cornyn.
OPENING STATEMENT OF HON. AL FRANKEN, A U.S. SENATOR FROM THE STATE OF MINNESOTA
Senator FRANKEN. Good afternoon. This hearing will come to order.

Today we will consider five judicial nominations. First, we will hear from Justice James Graves, Jr., who is nominated for circuit judge for the fifth circuit.

We are fortunate to have some of these nominees' home State Senators here to introduce them, and we will turn to them shortly. Before we do, I will turn the floor over to my friend, the Ranking Member, Senator Sessions, for his opening remarks.
Senator.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman. It is good to be with you, and have enjoyed serving with you on the Committee. You have taken a great interest in these important matters, spend time on them, and that speaks well of your approach to law and justice in America; and, have had the good judgment to correct me on occasion when I have been wrong.

Senator FRANKEN. Very, very, very rarely.

Senator SESSIONS. You are very, very nice and kind.

Senator FRANKEN. Thank you.

Senator SESSIONS. We have had, I think, a good Committee and we try to do our job right. It is the only real opportunity the American people have in a public forum to have the nominees answer questions and discuss the issues.

I have looked at the record of the nominees. I have some concerns. We will discuss some of those today. But we try to be supportive of good nominees, and I have voted for an overwhelming number of those. And most have received unanimous votes out of the Committee.

I would like to take a moment to address the notion, that I think is mistaken, that district court nominees that the President has submitted have been treated unfairly or in an unprecedented manner. On average, Senators have had only 55 days this year to prepare for hearings, that is, from nomination to hearing of district court nominees.

By contrast, during the Bush Administration, Senators had an average of 120 days before the district court nominees had a hearing. Last week, one of our colleagues raised the question of whether or not we are violating tradition when two home State Senators approve a nominee, and he felt that they should get a straight up or down vote without delay. But that has not been the tradition, as many have suggested.

Fourteen of President Bush's district court nominees had the support of their home State Senators, but did not get an up or down vote, because they were delayed mostly in committee. Thomas Farr of North Carolina had the support of both Senators Burr and Dole and waited 757 days and never got a hearing. He was rated unanimously well qualified by the ABA, and no concerns were ever raised about his nomination.

Richard Honaker of Wyoming had the support of both Senators Enzi and Barrasso and waited 655 days for an up or down vote in the Senate, but it never came. He was rated unanimously well qualified, the highest rating by the ABA. And the only concerns raised were his co- sponsorship of a pro-life bill in 1991, while serving as a Democratic member of the Wyoming House of Representatives.

Gus Puryear of Tennessee had the support of Senators Alexander and Corker and waited 569 days for an up or down vote on the Senate floor, but never got it. The ABA rated him unanimously qualified, and none of the concerns raised were significant.

Richard Barry of Mississippi had the support of Senators Wicker and Cochran and waited 155 days just for a hearing, but it never came. He was rated well qualified by the ABA, and no concerns were raised.

So I just wanted to make that point. We are in a lot of give-and take and fussing here. So we do have a responsibility, I think all of us in the Senate, to make sure the nominees are well treated and we do take seriously the support of home State Senators.

Thank you.

Senator FRANKEN. Thank you. Thank you, Mr. Ranking Member.

I would now like to welcome my distinguished colleagues from Mississippi, Senator Cochran and Senator Wicker, to introduce Justice James Graves, Jr.

Senators, thank you both for being here. We will start with Senator Cochran.

PRESENTATION OF JAMES E. GRAVES, JR., NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE FIFTH CIRCUIT BY HON. THAD COCHRAN, A U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Senator COCHRAN. Mr. Chairman, thank you very much. I am very pleased to introduce Justice James Graves to the Judiciary Committee. He has been nominated by the President to serve as a circuit court judge on the United States Court of Appeals for the Fifth Circuit.

He received his undergraduate degree from Millsaps College in Jackson, Mississippi. He earned a law degree from Syracuse University College of Law, and he has a master's degree of public administration from Syracuse University.

Justice Graves has served as legal counsel in the Mississippi Attorney General's office in the Divisions of Human Services and Health Law. He also served as director of the Child Support Enforcement Division at the Mississippi Department of Human Services.

Justice Graves currently serves as a presiding justice on the Mississippi Supreme Court. Before his appointment to our State Supreme Court in 2001, he served as a Mississippi trial court judge for 10 years. His other experiences include working with the Mississippi Legal Services and other community organizations in our State.

Soon after his graduation from law school, he served as an adjunct professor at several universities in our State. He has received many honors, and the Mississippi legal community is very proud to have joined in endorsing him and recommending his nomination to the Committee.

So I am pleased to recommend his confirmation to the Senate.

Senator FRANKEN. Thank you, Senator.

Senator Wicker.

PRESENTATION OF JAMES E. GRAVES JR., NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE FIFTH CIRCUIT BY HON. ROGER WICKER, A U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Senator WICKER. Thank you, Mr. Chairman and members of the Committee. I am glad to join Senator Cochran here today, and I appreciate this opportunity to say a few enthusiastic words regarding the nomination of Mississippi Supreme Court Justice James Graves to serve on the United States Court of Appeals for the Fifth Circuit.

Of course, Justice Graves will have an opportunity to introduce his wife, Betty, and his family. They are here with him today. I know that this is a significant moment of accomplishment for the family, as well, and I congratulate them.

I support this nomination for all of the reasons that Senator Cochran has already outlined—this candidate's education, his professional experience, and his life experience.

I would add to the specifics mentioned by Senator Cochran the fact that Justice Graves has been recognized on numerous occasions with awards noting his true servant's spirit, which I believe is a testament to his dedication to his family and community.

Those who know him know that he is particularly committed to teaching, motivating and inspiring young people, particularly the young people of his native State of Mississippi. For example, he has coached high school, college and law school mock trial teams, including the Jackson Murrah High School mock trial team, which won the 2001 State championship. Also, in 2001, he was honored as the Jackson Public School District Parent of the Year.

These are just some of the many examples that demonstrate his remarkable service to the public, in addition, of course, to the education and professional accomplishments that Senator Cochran mentioned.

So in conclusion, let me say, Mr. Chairman, that I support this nomination and I congratulate Justice Graves and wish him all the best.

Thank you to the members of the Committee for your hard work in this confirmation process. Thank you.

Senator FRANKEN. Thank you, Senator. I would like to thank both of my distinguished colleagues from Mississippi.

So for all the nominees who have been introduced, I thank you all for your service to our country and for offering yourselves up for this great responsibility.

Justice Graves, will you take your seat on our panel, please? Actually, before you do, why do you not just stand and raise your hand, swear in the oath?

[Nominee sworn.]

Senator FRANKEN. Please have a seat. Justice Graves, I understand

some of your family and friends are here. So please feel free to introduce them on this proud day.

STATEMENT OF JAMES E. GRAVES, JR., NOMINEE TO BE UNITED STATES CIRCUIT JUDGE FOR THE FIFTH CIRCUIT
Justice GRAVES. Thank you very much, Mr. Chairman. I'd like to first thank the President for nominating me to serve as a judge on the Fifth Circuit Court of Appeals. I want to thank Chairman Leahy for an opportunity to appear before this Committee. I want to thank Ranking Member Sessions. Thank you, Mr. Chairman. Thank all on the Senate Judiciary Committee for the opportunity to be here today to answer any questions the Committee may have. I appreciate the opportunity to introduce members of my family who are present here today, and I am asking them to stand when they are introduced.

My wife, who has been married to me sometimes for longer than she cares to recall, is here and I am going to ask her to stand. My parents are here, both my mother and father.

Senator FRANKEN. Welcome, and congratulations.

Justice GRAVES. I have three sons and, actually, I didn't look back to see if the third son had made it. But my three sons——

Senator FRANKEN. That is yes, I think.

Justice GRAVES. Is that a yes? He is here.

Senator FRANKEN. Well, I see a hand up.

Justice GRAVES. Very good. I am very happy, son.

[Laughter.]

Justice GRAVES. That would be my son, Chris. And my son, James, and his wife, Tiffany. My son, Jeffrey, and his wife, Eyra. And someone should be holding my beautiful granddaughter.

Senator FRANKEN. Your daughter-in-law is holding your granddaughter.

Justice GRAVES. Wonderful. They told me not to look back. They said, "Talk into the microphone, don't look back."

Senator FRANKEN. You can look and then talk.

Justice GRAVES. I can look and then talk.

Senator FRANKEN. Yes.

Justice GRAVES. That's going to be hard.

Senator FRANKEN. Well, it is not a qualification for judge.

Justice GRAVES. And I think that's all of the immediate family that's here. Well, my brother, Darrell, is here. He's only 6'6", so it's easy to understand how I might have overlooked him. Darrell is here.

And then I have some of my chamber staff who are here, my clerk, Sherwood Colette is here. My assistant, Jackie Losset is here. My other clerk, Susan Huett, I am absolutely certain is watching the live Webcast. And I want to thank all those people for the support they have given me over the years. I thank them for being here.

My three sisters, I am certain, are watching the live Webcast, as are my colleagues, I hope, or at least they're going to tell me they saw it, my colleagues at the Mississippi Supreme Court.

But I really do appreciate this opportunity. I thank all my family and all the other friends who are here today.

And having no formal remarks, Mr. Chairman, I'd be pleased now to answer any questions the Committee may have.

Senator FRANKEN. Absolutely. And I would like to welcome your

family and your staff members who are here on this, which must be a very proud day for them.

Justice Graves, we met yesterday.

Justice GRAVES. Yes.

Senator FRANKEN. I must say I was very impressed during our conversation. You have served on Mississippi's highest court for nearly 10 years. If you are confirmed to the fifth circuit, more of your work will involve interpreting our work here; and by that, I mean, of course, Federal statutes.

How will you make sure that you interpret Federal statutes in line with our intent in passing them?

Justice GRAVES. Well, I think I would—with regard to my work as an appellate judge, if confirmed for the court of appeals, I would approach those cases the same as I've approached the handling of cases in the 9 years now that I've been a Mississippi Supreme Court justice.

I would examine the record, look at the law that was applicable to the record, the facts of that particular case, apply the law to the facts, in trying to reach an appropriate result in whatever case is before me as a judge.

Senator FRANKEN. Well, is there any way you feel that your job would be different as a Federal appellate judge than as a Supreme Court justice in the State of Mississippi?

Justice GRAVES. I'm certain it would be different to the extent that I would be dealing with Federal law. Now, as a Supreme Court justice in the State of Mississippi, obviously, I am, for the most part, dealing with cases that arise either under our constitution or under our state laws and the laws passed by our legislature. As a Federal judge, I know that I would be dealing primarily with Federal law and, as you stated, laws passed by the U.S. Congress, and it would be necessary for me to read—study that law and apply it to the facts in the particular case that would be coming before the court of appeals.

Senator FRANKEN. As a Supreme Court justice, how did you determine the intent of the State legislators when they passed those laws? Would you just simply go by the text of the law? Would you go into the record that was made while the law was debated and passed?

Justice GRAVES. I think on first approach, you look at the statute and try and determine what the language of the statute says, and that's the first place to look in determining what the statute means. Hopefully, it says what it means and it means what it says. And in the State of Mississippi, there is a dearth of legislative history. And so there's not a lot of that there in terms of recorded history with regard to debate that preceded legislation, those kinds of things.

So typically, it's looking at the statute, trying to interpret what the statute means, if it means what it says. The next thing you'd do is look at whether or not there is any precedent, any case law, where there have been judicial interpretations of a particular statute, and you would look to that precedent for guidance in reaching a decision involving that statute, in the State of Mississippi. Now, I recognize that with the U.S. Congress, there could be some more extensive records, history regarding legislative intent.

Senator FRANKEN. Thank you. Justice Graves, I think it is remarkable that you have remained so active in your community, despite the rigors of your position as justice in the State Supreme Court.

Can you tell me about your work on the board of Operation Shoestring and the Mississippi Children's Museum?

Justice GRAVES. Operation Shoestring is an organization which started more than 40 years ago in an area of Jackson, which is now sort of a—it has been a blighted area, but the area is being revitalized. But Operation Shoestring promotes and sponsors after school programs to educate and involve the children in that community. They have programs for teaching children, which have resulted in improvement in their test scores, reading programs, literacy programs, and sometimes just feeding programs and daycare and after school programs for children in the community.

And I've been serving on that board now for more than 3 years, because I think Operation Shoestring does such important work in the community.

Mississippi has no children's museum. And so several years ago, some members of the Junior League and a couple of other organizations got the idea to start a children's museum, and they asked me to serve on the advisory committee. And I just have a deep concern for children and education.

And my vision was that a children's museum would be a great vehicle for educating children, and so I agreed to serve on the advisory committee, and then on the board. When the project began, it was determined that there was a need to raise about \$25 million, and this was maybe 5 years ago, to get the museum started. I, as a judge, obviously, can't be involved in fundraising, but every other aspect of the museum that I could be involved in, I have been involved in.

I am pleased to report that the grand opening for the Mississippi Children's Museum—and they'll be happy I'm doing this now—the grand opening for the Mississippi Children's Museum will be this fall. It is the first children's museum in the State of Mississippi.

Senator FRANKEN. Thank you, Your Honor. And I will turn it over to the Ranking Member.

Senator SESSIONS. Thank you. Justice Graves, it is a pleasure to be with you again. I enjoyed our opportunity to talk and appreciated your comments at that time, and I enjoyed that opportunity in dialogue.

It is good that you have your home State Senators' support. And you have had a good bit of time now, 8 years, on the Mississippi Supreme Court. Well, by now, you have probably decided whether you like writing opinions or not.

Do you like that work?

Justice GRAVES. Yes, sir.

Senator SESSIONS. The burden on judges is significant, and I think the caseload burden on our justices probably will remain high. There are several reasons I think that we should not add judges just to continue a certain fixed number of cases.

I guess we are going to have to do better and keep the collegiality and smaller numbers, where possible. And I suppose you are willing to serve for the pay that has been offered. Do you

know what the pay is?

Justice GRAVES. I have a general idea, but I am certain I am willing to serve for that pay.

Senator SESSIONS. And we hope 1 day judges can get pay raises, but we are in a tight budget. So it cannot be guaranteed.

Let me ask you about *Doss v. State*; your former colleague on the Supreme Court of Mississippi, Judge Diaz, wrote, in dissent, and you joined it, and stated the following: "When our founding fathers ratified the Federal and State Constitutions in 1788 and 1890, they did not consider all forms of the death penalty to be violative of our bans on cruel and unusual punishment." And I certainly would agree with that.

"But just as we would disagree with our framers," he went on to say that, "for example, the execution of a child, necessarily amounts to a violation of the Eighth Amendment, our society's notion of what is cruel and unusual changes with time."

Do you personally agree with that, that the cruel and unusual definition changes with time?

Justice GRAVES. Senator, that *Doss* opinion, was handed down by the Mississippi Supreme Court, I believe, in 2008 and Justice Diaz did write a dissenting opinion in that case, which I joined.

But I'd like to point out that there were two issues about which I was chiefly concerned in that case, and those two issues had to do with the ineffective assistance of counsel and the mental retardation issue.

His dissenting opinion addressed, in part one, those two issues. And those were the only two issues raised by the defendant in that case. Those were the substantive issues. Those were the issues about which I was concerned, and I take responsibility for joining that opinion.

But I have not now nor have I ever espoused any view that the death penalty was unconstitutional, and, in fact, that case was brought back on re-hearing before the Mississippi Supreme Court in 2009 and I had an opportunity to author a majority opinion in that case and I addressed in that majority opinion one of the chief issues which concerned me, and that was the ineffective assistance of counsel issue.

I wrote a dissenting opinion in that case with regard to the mental retardation issue. But that case has been withdrawn. A new opinion has been handed down, and everything that I wanted to say about *Doss* and the issues involved in the *Doss* case I said and had every opportunity to say in the new opinion which was handed down in 2009, and I chose to address those two issues and nothing else.

Senator SESSIONS. Well, I understand that, and cases come fast and furious to a court. But language does have meaning, I think. Later on, one of the decisions Justice Diaz cited was the Supreme Court's opinion in *Roper v. Simmons*. In that decision, the Supreme Court relied on foreign law in holding that the execution of minors violated the Eighth Amendment.

Do you think it is proper to look to foreign law to define the Eighth Amendment of the United States Constitution?

Justice GRAVES. I think it's proper to look to the laws of the United States and the Constitution of the United States in making

determinations about the Eighth Amendment to the United States Constitution.

Senator SESSIONS. Well, I think I agree with what you said. Justice Diaz's dissent went on to conclude, quote, "The death penalty is reduced to pointless and needless extinction of life, with only marginal contributions to any discernable social or public purpose.

A penalty with such negligible returns to the State is patently excessive and cruel and unusual punishment, violative of the Eighth Amendment," close quote.

That, I suppose, is the phrase that worried me the most. It seems that you went along with the opinion that he had written that the death penalty is pointless and needless extinction of life. That is a matter we can talk about and disagree.

But I am more worried about the apparent statement that it is so negligible in returns to the State, that it is patently excessive and cruel and unusual punishment, violative of the Eighth Amendment.

Is that your position today?

Justice GRAVES. No, it is not, Senator. And all I can say is that when I read what he wrote, I viewed it as his plea for a dialog on the efficacy of the death penalty.

In retrospect, I can see how it may not be clear, but I never intended to adopt his thoughts, his concerns with regard to the death penalty. My chief concern was the ineffective assistance of counsel issue, the mental retardation issue.

Senator SESSIONS. Well, the Constitution deserves a fair interpretation, it seems to me, and what essentially the people who ratified it meant. And would you not agree that there are multiple references in the Constitution from the earliest draft through various amendments, the Fourteenth Amendment and others later, that refer to capital crimes? You cannot take life without due process, but you could take life with due process. I think there are six or eight such references.

So it would be difficult to interpret the Eighth Amendment, cruel and unusual punishment, it seems to me, as the Constitution prohibiting all death penalty. Would you agree with that analysis?

Justice GRAVES. Senator, I fully expect that if I am confirmed, I will take an oath and that oath will be to uphold the laws and the Constitution of the United States. And the United States Supreme Court has determined that the death penalty does not constitute cruel and unusual punishment, and I would follow the law as handed down by the United States Supreme Court.

Senator SESSIONS. Well, we had two members of the Supreme Court that dissented in every case, Justices Marshall and Brennan, and they contended the death penalty was cruel and unusual and that it was unconstitutional.

No longer are such dissents occurring. It seems to me that Judge Diaz and you signed an opinion that agreed with that view. But I hear you saying that that did not necessarily represent your carefully considered intellectual view of that particular issue. It was more a willingness to sign on to Justice Diaz's dissent as an expression of concern about this case. But it did say more than that, apparently. It seemed to say a good bit more.

Would you just share once more your thoughts about this fundamental question about whether you could use the Eighth Amendment

to declare all death penalties unconstitutional?

Justice GRAVES. I think, Senator Sessions, that maybe the best evidence of how I would handle death penalty matters, if they came before me as a judge on the Fifth Circuit Court of Appeals, is the way I've handled them as a Mississippi Supreme Court justice. In the 9 years that I've been a Supreme Court justice in the State of Mississippi, I've had an opportunity to vote on at least a dozen death penalty cases, where I've voted to affirm both a conviction and a sentence of death.

I've voted to affirm convictions and death sentences both before that Doss opinion and since the Doss opinion.

Senator SESSIONS. I appreciate that. I guess I would go one more step here and say as you analyze the Constitution and laws of the United States that come before you, will you seek to enforce them as they are written, fairly interpreting them as best you are able, to carry out the will of the populous who elected them through their elected representatives, passed them through their elected representatives?

And the fact that you may or may not agree that the death penalty is good policy—and I think people can disagree about that—do you think that the Constitution prohibits its implementation, if left to your judgment?

Justice GRAVES. If left to my judgment, I'm going to follow the law as handed down by the United States Supreme Court, and it clearly is that the death penalty does not constitute cruel and unusual punishment.

Senator SESSIONS. But you signed an opinion that seemed to say that you do not agree with that, that you believe that it is of negligible benefit to the State; therefore, it is unconstitutional. Is that what you meant to say?

Justice GRAVES. It is not.

Senator SESSIONS. Thank you.

Senator FRANKEN. Remember, you said the thing about——

Senator SESSIONS. My time is over.

Senator FRANKEN.—my correcting you. Thank you.

Senator SESSIONS. The Chairman has a right to bring the hammer down on elongated questioning.

Senator FRANKEN. Yes. Thank you. I would like to thank the Ranking Member. And thank you, Justice Graves. We will now proceed to the second panel.

Justice GRAVES. Thank you.

JOSEPH GREENAWAY
WEDNESDAY, SEPTEMBER 9, 2009
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Committee met, Pursuant to notice, at 2:34 p.m., Room 226,
Dirksen Senate Office Building, Hon. Sheldon Whitehouse presiding.
Present: Senators Klobuchar, Franken, and Sessions.

OPENING STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S.
SENATOR FROM THE STATE OF RHODE ISLAND

Senator WHITEHOUSE. The hearing will come to order.

Today we will consider four nominations to the Federal bench.

Judge Joseph Greenaway has been nominated to the United States
Court of Appeals for the Third Circuit; Roberto Lange has been
nominated to the United States District Court for the District of
South Dakota; Judge Irene Berger has been nominated to the
United States District Court for the Southern District of West Virginia;
and Judge Charlene Honeywell has been nominated to the
United States District Court for the Middle District of Florida.

I understand that the Ranking Member, Senator Sessions, is on
his way here and will be joining us shortly, but I would like to take
this moment to welcome each of the nominees, and their families,
and their friends to the U.S. Senate.

I also, of course, would like to welcome those of my colleagues
who are here to introduce the nominees. This Committee is graced
by the presence of such a distinguished array of my colleagues.
In the interest of efficiency, let me outline how this hearing will
proceed. If the Ranking Member arrives and wishes to make remarks,
we will accommodate him at this point. At the conclusion
of my remarks, if he is not here, I will allow the introductions by
the home State Senators to begin. Their introductions will proceed
in order of seniority, and each will have the chance to introduce the
nominees for their States.

We then will have two panels. The first panel will be Judge
Greenaway, and the second will be all the remaining nominees.
Senators on the Committee will have 5-minute rounds in which to
question each panel.

Without the Ranking Member here, I ask unanimous consent
that the remainder of my opening statement be put into the record
so that I do not delay my colleagues any longer, and we will begin
with the introduction of Judge Berger by the distinguished Senator
from the State of West Virginia, the Honorable Jay Rockefeller.
Senator Rockefeller.

[The prepared statement of Senator Whitehouse appears as a
submission for the record.]

And our last speakers, in order of seniority: Senator Lautenberg,
and then Senator Menendez of New Jersey, speaking on behalf of
Judge Greenaway.

Senator Lautenberg.

PRESENTATION OF JOSEPH A. GREENAWAY, NOMINEE TO BE
U.S. CIRCUIT COURT JUDGE FOR THE THIRD CIRCUIT, BY
HON. FRANK R. LAUTENBERG, A U.S. SENATOR FROM THE
STATE OF NEW JERSEY

Senator LAUTENBERG. Thank you very much, Mr. Chairman and the Ranking Member of the Committee, Senator Sessions, members of the Committee, for the opportunity to be here today to present a fellow Columbia University graduate—obviously not in the same class year.

[Laughter.]

Senator LAUTENBERG. Why is there such a snicker going through?

[Laughter.]

Senator LAUTENBERG. One of New Jersey's most distinguished public servants, Judge Joseph Greenaway.

On the District Court in Newark, Judge Greenaway has demonstrated his core values of integrity and fairness, the same values that will make him a success on the Third Circuit Court of Appeals. Through his impressive career, I've been fortunate enough to watch Judge Greenaway at work for our State and our people. Judge Greenaway became an Assistant U.S. Attorney in Newark in 1985. He first served in the Criminal Division, where he worked on bank fraud and white collar crime investigations. In 1989, he was promoted to head the division dedicated to prosecuting narcotics cases. From 1990 to 1996, Judge Greenaway served as an in-house counsel for Johnson & Johnson, a prominent pharmaceutical company in New Brunswick, one of New Jersey's great companies. Then in 1996, Judge Greenaway was appointed by President Clinton to the United States District Court for the District of New Jersey, where he has since served.

Now, I introduced him to this Committee at that time, as I am today, and I do it with great enthusiasm. The best thing about Judge Greenaway is that, despite his critical and time-consuming responsibilities in the court, he still finds time to give back to the community. He teaches criminal law, criminal trial practice classes at Cardozo Law School, where I sit now as an honorary board member, as I was on that board for some time. He helps train the next generation of legal thinkers and leaders.

Judge Greenaway also teaches a course about Supreme Court at both Cardozo Law School and Columbia University. He spent his career protecting New Jerseyans and their rights, and I know that we can depend on him to do the same for our Nation as an Appeals Court judge.

I am pleased that President Obama has selected Judge Greenaway for this post and I urge my colleagues to support his confirmation.

Before introducing his family, I want to say that I was honored to have a courthouse carry my name during my absence from the Senate, and I authored something to be posted on the plaque that carries the name. I said on that plaque, "The full measure of a democracy is its dispensation of justice", and I can't think of anyone who fills that obligation better than Judge Joe Greenaway.

Now I want to recognize Judge Greenaway's wife, Veronica Blake Greenaway, his son Joseph, his daughter Samantha, and his parents as well. We all know that he would not be here today without your love and support.

Mr. Chairman, I thank you for the opportunity to testify at this time.

Senator WHITEHOUSE. Thank you, Senator Lautenberg.

Senator Menendez.

PRESENTATION OF JOSEPH A. GREENAWAY, NOMINEE TO BE
U.S. CIRCUIT COURT JUDGE FOR THE THIRD CIRCUIT, BY
HON. ROBERT MENENDEZ, A U.S. SENATOR FROM THE
STATE OF NEW JERSEY

Senator MENENDEZ. Thank you, Mr. Chairman, to the distinguished Ranking Member, to all the distinguished members of the Committee. I am pleased to join my colleague in the Senate, Senator Lautenberg, and to have the pleasure and honor to come before the Committee today to introduce a man from New Jersey who fully embodies the qualities of respect for justice and the rule of law we demand of all of our judges.

At the age of 40, Judge Joseph Greenaway, Jr. was appointed by President Clinton to the Federal bench and he has served for over a dozen years with distinction. He earned a bachelor of arts from Columbia University, where he was honored in 1997 with the Columbia University Medal of Excellence and with the John Jay.

Award in 2003.

He was an Earl Warren Legal Scholar at Harvard University, where he received his J.D. and served as a member of the Harvard Civil Rights and Civil Liberties Law Review. He clerked for the late Honorable Vincent L. Broderick in the U.S. District Court for the Southern District of New York before he became an Assistant U.S. Attorney in Newark and received a promotion to become chief of the Narcotics Bureau.

In the private sector, he was an associate with the firm of Kramer, Levin, Nessen, Kamin & Frankel, and served at Johnson & Johnson, as Senator Lautenberg said, as their in-house counsel. He is chair emeritus of the Columbia College Black Alumni Council. He has been an adjunct professor at my alma mater, Rutgers Law School. He is an adjunct professor at the Cardozo School of Law, where he teaches a course on trial practice and a seminar on the Supreme Court. He is also an adjunct at Columbia College, where he teaches a seminar on the Supreme Court.

But that is Judge Greenaway's resume. It is a distinguished resume, to say the least. It also is one that I'm sure, through your questions, you will find a judge who has the demeanor, the intellect, the integrity, the deference to the rule of law as well as to precedent, and you'll get those from your questions. But it does not do justice to Judge Greenaway the man.

There is an inscription, Mr. Chairman, over the Tenth Street entrance to the U.S. Department of Justice, just a few blocks from here. That inscription says, "Justice in the life and conduct of the state is possible only as first it resides in the hearts and souls of men."

So, Mr. Chairman, I can tell you, those true qualities of justice do indeed reside in the heart and soul of Judge Greenaway. He was born in London, grew up in Harlem, in the northeast Bronx, not far from where Justice Sotomayor grew up, and just across the river from where I grew up.

He is accomplished and successful, but he's given a lot back. In 2006, when he spoke at the Benjamin Cardozo School of Law Yeshiva, Dean David Rudenstein said then, "Judge Greenaway has

been a generous teacher and mentor to Cardozo students throughout the years and has touched many of their lives in meaningful ways. I'm delighted that our graduates will have the opportunity to hear his insights, witness his humaneness, and be inspired by his example."

Judge Greenaway, who long taught master classes at Yeshiva, has always been instrumental in mentoring students and graduates, often taking them under his wing as law clerks or fellows.

He has said, "I tell my students to work hard and work smart. Our profession requires a drive to search for perfection. Without that goal, mediocrity becomes the norm." Well, mediocrity has never, and never will be, the norm for Judge Greenaway. He has always strived for excellence and he's always taught young lawyers to do the same.

So in conclusion, Mr. Chairman, members of the Committee, when we look to our courts to dispense justice fairly, honorably, equally under the law, we look to those among us who have worked hard not only for themselves, but for the betterment of the community as a whole. We look to those who have achieved much, but whose humility allows them to take the long view, to see the whole board, and act accordingly. Judge Joseph Greenaway is that kind of judge, the kind of person we look to when we think of the notion of equal dispensation of justice under law.

It is my pleasure to join Senator Lautenberg in introducing him to the Committee and thank him for his service to New Jersey. I know that I join with all of you in wishing him and his wife Veronica, his son Joseph, and his daughter Samantha good luck and godspeed on this next journey in life.

Mr. Chairman, I appreciate your opportunity to make this presentation. I urge the Committee to recommend favorable action and a speedy confirmation to the Third Circuit Court of Appeals.

Senator WHITEHOUSE. I thank you, Senator Menendez. I thank all of my colleagues who have taken the trouble, from extremely busy schedules, to come here today and speak on behalf of these candidates. The constitutional prerogative of advice and consent and the Senate tradition requiring the approval of the home State Senators for judicial appointments, I think, lead to wonderful consequences for America in the caliber of the appointees who are brought forward and the requirement that they meet the confidence of their home State Senators in order to achieve these lifetime appointments. So in coming before us as you have, you are, I believe, acting in the finest traditions of the U.S. Senate, and I appreciate that you took the trouble to do so. The panel is excused. If the distinguished Ranking Member would like to make an opening statement, I would invite him to do so when the situation settles down in a moment. After that, we will call up Judge Greenaway first.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Mr. Chairman, I thank you for this opportunity. It is a part of our congressional responsibility, a senatorial constitutional requirement that we examine nominees for the bench. We hope and look forward to a good group of nominations from this administration.

I think the Senators that just testified being strong in their support for these nominees is always most meaningful to me, and I think the other Senators—to the nominees, I think that will stand you in good stead to have their firm and vigorous support. I think it will definitely make a difference in how those confirmation hearings go.

We do have some disagreements, I think, about the role of courts and how they should conduct themselves in America today, sort of a national discussion about, to what extent judges are bound by the law and to what extent they feel that they are empowered to allow their personal feelings or approaches to law affect how they decide cases. So I think that's something that is very important to me and we'll ask about it, but all in all, I think the nominees that we're seeing here today that will be before us have good records, and I look forward to examining them.

Senator WHITEHOUSE. I thank the very distinguished Ranking Member.

I would now ask the Honorable Joseph Greenaway to come forward. [Whereupon, the nominee was duly sworn.]

Senator WHITEHOUSE. Please be seated, and welcome.

Do you have an opening statement? If you would be good enough to turn on your microphone, that would help. You are most welcome to introduce your family who are here with you in addition to making some opening remarks, if you would care to do so.

STATEMENT OF HON. JOSEPH A. GREENAWAY, TO BE U.S. CIRCUIT COURT JUDGE FOR THE THIRD CIRCUIT

Judge GREENAWAY. Well, thank you so much, Mr. Chairman.

The first remark I'd like to make is to thank God for his grace and countenance that I'm here today. I'd like to thank President Obama for his confidence in me with regard to this nomination. I'd like to thank Senators Lautenberg and Menendez, Congressman Payne, and others. I'd like to thank my family and friends for being here today. I'd also like to thank you, Mr. Chairman, and the Ranking Member and the Committee members who are present as well.

I'd also like to take this opportunity to introduce my family. I'm not going to turn around, because I'm told that that would mean you can't hear me. So behind me is my father, Joseph Greenaway.

Senator WHITEHOUSE. Welcome, sir. We're glad to have you with us. Congratulations on your son's accomplishments.

Judge GREENAWAY. My wife, Veronica Greenaway.

Senator WHITEHOUSE. Wonderful to have you with us.

Judge GREENAWAY. My son, for his second visit. He was six the last time.

[Laughter.]

Judge GREENAWAY. He's a little older now.

Senator WHITEHOUSE. He has grown handsomely since then, Your Honor.

Judge GREENAWAY. Thank you, Mr. Chairman.

My daughter Samantha, who was not here the last time.

Senator WHITEHOUSE. Welcome.

Judge GREENAWAY. My two sisters, Rosemary and Sonia, my brother-in-law Rodney, and Charlotte Rosen, my son's special friend.

[Laughter.]

Judge GREENAWAY. And Mr. Chairman, I'm graced with the presence of many friends, lifelong friends, law clerks and interns who are here for today's proceedings.

Thank you so very much.

Senator WHITEHOUSE. You are most welcome, and we are delighted to have you here. I congratulate you on the quality and extent of your public service to date and hope that a speedy and uneventful confirmation awaits you here.

I would like to ask you the same question that I asked now-Justice Sotomayor when she was before our Committee for confirmation, and that is whether, in your role as an appellate judge, you will respect the role of Congress as representatives of the American people, decide cases based on the law and the facts, not prejudge any case, but listen to every party that comes before the court, respect precedent, and limit yourself to the issues that the court must decide?

Judge GREENAWAY. Let me give you my unequivocal assurance, Mr. Chairman, that with regard to each of those items, that that is exactly what I have been doing and what, if I am confirmed—fortunate enough to be confirmed, I intend to do in the future.

The role of stare decisis in our legal system is critical. I believe in it and I have adhered to it as a District Court judge. I believe that the only basis that cases can be decided on are the law and the facts and not some predetermined notion of what the outcome should be. Clearly, in my work as a District Judge, I have respected the role of Congress in our tripartite system.

Senator WHITEHOUSE. In the context of your pledge to listen to every party that comes before the court, clearly not every party comes before the court with similar resources. Sometimes parties are represented by enormous law firms, sometimes they're represented by considerable numbers of enormous law firms. Sometimes a party comes before the court with a new lawyer, a solo practitioner, perhaps even a lawyer who is simply having a bad day. What is your view of the judge's role in ensuring that those differences of resources do not interfere with each party's right to a fair trial before the court?

Judge GREENAWAY. Thank you, Mr. Chairman. I believe that the role of the judge, when there's an inequity in resources, an inequity in legal talent, as you've alluded to in your question, is frankly confined. I don't believe that the role of a district judge or a circuit judge is to sort of try to even things out. I've had cases where a solo practitioner is up against a massive law firm and, frankly, outdoes them quite nicely.

I know in our own district, some of our CJA counsel are among the best lawyers available in the State. I think that if a judge were to say, you know, I'm not sure things are evened out so I'm going to call this one this way to kind of even things out, I think that that kind of interference or intrusion into the system is one that is ill-advised.

I haven't followed that, and I would not want to in the future.

I do believe that all people who appear before me, those with limited resources and those with unlimited resources, deserve fair treatment. I have done that. If confirmed, I would continue to do

that. I believe that is the only role that a judge can play, to play it down the middle and call it as you see it.

Senator WHITEHOUSE. Finally, Your Honor, the Constitution embodies eternal principles that may be at odds with popular conventions or passions of the time and substantial societal expectations may have grown around those conventions or passions by the time a matter comes before the court.

You may find yourself in a situation in which you find that the eternal principles of the Constitution, if applied properly, are actually disruptive of certain expectations and certain settled practices, and perhaps even certain interests. Do you feel any hesitancy, when the facts and the law and the principles of the Constitution so direct, to disrupt those conventions or practices that have settled around those popular passions?

Judge GREENAWAY. Well, Mr. Chairman, I believe that the beauty of the Constitution is its enduring quality. I also believe that the prescience of the Founding Fathers was in giving Federal judges lifetime tenure so that in those instances that you've alluded to, those times when difficult decisions have to be made so that judges act in conformity with the Constitution rather than public opinion, those decisions can be made without fear of retribution.

I do believe that the Constitution of the United States is a wonderfully constructed document. It is one that I enjoy reading. I believe that it is important to apply. I think that public opinion on particular issues comes and goes, but I think that the fact that that endures and that it is difficult, under our constitutional system of government, for amendments to be made speaks to the fact that the Constitution, for whatever foibles people may have with or see in it, should be followed.

Senator WHITEHOUSE. I thank you. My time has expired.

I'd call on the distinguished Ranking Member.

Senator SESSIONS. Thank you, Mr. Chairman.

Judge Greenaway, it's a pleasure to be with you. I think you showed some admirable humility in your opening statement, thanking the President and God for your opportunity to serve in this august position. Some people get on the bench and they think they are anointed rather than appointed, as they say.

[Laughter.]

Judge GREENAWAY. Not I, sir.

Senator SESSIONS. A little humility doesn't hurt for somebody who's got a lifetime appointment and we can't vote you out of office. But you have a lot of good friends, a lot of firm recommendations, and both of your Senators are very supportive.

I remember, really before I came here, my staff has found a statement you made last time, when you were up for confirmation, that "judicial activism is a practice that goes beyond the bounds of permissible jurisprudence, as set forth in the Constitution. In my view, engaging in such activism requires a jurist to begin the journey down the proverbial slippery slope. Once down that path, stare decisis and the Constitution fall prey to that judge's perceptions, prejudices, and predilections. This approach is antithetical to the intent of the framers of the Constitution and results in haphazard decisionmaking."

You go on to say, "A Federal judge cannot impose his or her own

views on what the law should be as if sitting as a super-legislature. In theory and practice, judicial opinions must be measured and guided by precedent and the Constitution. Judges must limit themselves to the parameters permissible within the larger constitutional scheme.”

So I guess I like that.

Judge GREENAWAY. Thank you very much, Senator.

Senator SESSIONS. Do you still believe that?

Judge GREENAWAY. Absolutely, sir.

Senator SESSIONS. You made a speech, a lecture entitled, “Judicial Decision-Making in the External Environment”. You said that “the external environment consists of the political, social, intellectual, and other forces that influence and affect our judiciary and its decisionmaking. Although the public may believe that judges make their ruling in a vacuum, they clearly do not. Not only does each member of the judiciary come to the bench with a different set of experiences, but our environment affects each judge differently as well.”

Then you note that Justice Black, who ruled in the Japanese detention case, the Koramatsu case, was “undoubtedly influenced by several factors outside the record, such as his own military career, the fact that his sons were in World War II, and his friendship with General DeWitt.” I guess I think, as I read those remarks, you seemed to criticize Black for allowing those things to cause him to not be sensitive to the constitutional rights of the people, the Japanese citizens, who were interned. Is that correct?

Judge GREENAWAY. Well, Senator, I think that—well, first of all, you quoted me absolutely accurately. I think that my point in that article was that, No. 1, we had suspect classifications involved. No. 2, we were talking about probably one of the most egregious violations of an entire subgroup of Americans in our Nation’s history. No. 3, there was a real lack of evidence brought before the President before he acted, and the court before it acted.

In looking at Koramatsu critically, my view was, if we’re going to—if we as a society, and the court in particular, is going to take that kind of action, that we’d better have a good reason to do it and there should be some evidence to support it. Now, I think what you quoted with regard to Justice Black and his background is part of it, certainly not the only thing. But I think that was my point.

Senator SESSIONS. Well, sort of to follow up on Senator Whitehouse’s question about taking clear stands sometimes on important issues, even if not popular, I think there is a danger—do you not agree, that in a judge allowing such things, extra-judicial matters that you’ve cited that possibly could have influenced Black, there is a danger in allowing that to happen and could indeed weaken certain constitutional protections?

Judge GREENAWAY. That is certainly possible, sir.

Senator SESSIONS. Some people seem to think that feelings and experiences are necessarily good and are always going to lead a judge in the right way. Sometimes feelings could lead you in the wrong way in your experiences.

Judge GREENAWAY. That is also certainly possible, sir.

Senator SESSIONS. President Obama described, once, the kind of judges he would look for on the bench as follows: “We need somebody

who's got the heart, the empathy to recognize what it's like to be a young teenaged mom, the empathy to understand what it's like to be a poor African-American, or gay, or disabled, or old, and that's the criteria by which I'm going to be selecting my judges."

Now, Justice Sotomayor declined to endorse that as her philosophy of service on the bench. Do you have any comments about that and how you would approach the difficult task of judging?

Judge GREENAWAY. Well, Senator, I know a little bit about being African-American.

[Laughter.]

Judge GREENAWAY. I think we might not have had a lot of money growing up, but I didn't think we were poor. We were really rich in a lot of the more important things in life, my sisters and I. You know, I think my father and mother prepared us for life in the best way they could, and that is giving us the principles to be productive members of society.

I am not in the President's position with regard to what makes a good judge. The only thing I can tell you is that, in my years of experience, I've tried to be fair to folks, I've tried to treat them with the utmost respect and to deal with their—address their cases as best I could, applying the facts to the law.

Senator SESSIONS. Well, I thank you for saying that. We haven't done an exhaustive search of your record like what gets done for the Supreme Court nominees. Every word that they say gets researched. But it does appear that you have a good record and broad support in the community. Thank you.

Judge GREENAWAY. Thank you very much, Senator.

Senator WHITEHOUSE. Thank you, Senator Sessions.

As I said, Judge Greenaway, we hope very much for a speedy and uneventful confirmation. I thank you for your testimony here today. The record of the proceedings for you and for the other candidates will remain open for a week from the conclusion of this hearing, so if there are other comments anybody cares to make about your candidacy, they have that final week to make them before the record of these proceedings closes. But I welcome you here.

I congratulate your family on this achievement and I wish you godspeed.

Judge GREENAWAY. Thank you so much, Senator. Both Senators.

I appreciate it very much. Have a good day.

CAITLIN HALLIGAN
WEDNESDAY, FEBRUARY 2, 2011
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:05 p.m., Room SD-226, Dirksen Senate Office Building, Hon. Christopher Coons, presiding.
Present: Senators Schumer, Whitehouse, Klobuchar, Coons, Blumenthal, Grassley, Kyl, and Lee.

OPENING STATEMENT OF HON. CHRISTOPHER COONS, A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator COONS. Good afternoon, everyone. I am pleased to call this nominations hearing of the Senate Judiciary Committee to order.

I want to specifically thank Chairman Leahy, who will be joining us momentarily, for this opportunity to chair my first Judiciary Committee hearing, which is an important one.

As we are all aware, our Federal courts face a severe crisis today due to the high number of vacancies in the Federal bench. The caseloads facing them continue to grow, and, unfortunately, so do the number of judicial vacancies.

Today, in what is close to an all-time high, more than 100 Federal judgeships sit empty. And these vacancies not only strain our overburdened district and circuit courts, but unfairly deny American citizens access to timely judicial process.

Chief Justice Roberts himself has recently characterized these vacancies as a persistent national problem and has called upon us in the Senate to find a long-term solution.

The number of vacancies, though, tells only part of the story. In the last Congress, the Senate's average consideration of a district court judge took 104 days, the average circuit nominee, 163. This delay, as I mentioned, exacts a cost on the administration of justice and exacts a steep cost on individual nominees, and this is not, in my view, a partisan issue.

Our judiciary relies upon our ability to attract the brightest, most decent, and most qualified to serve, in particular, on the Federal bench, and we ask these qualified judicial candidates to accept detailed and lengthy public scrutiny, long delay, relatively meager pay relative to their professional qualifications and opportunities, in exchange for a career in public service.

I think we owe them a prompt public review consideration and not needless delay.

In the 112th Congress, I look forward to working together with Chairman Leahy, with Ranking Member Grassley, and with all my fellow members of the Senate Judiciary Committee to fulfill our duty to advise and consent and work through these nominees in a thorough, yet reasonably expeditious manner.

With that in mind, I'd like to welcome today each of the nominees, their families and their friends to the U.S. Senate, and congratulate them on their nomination.

I would also like to welcome those of my colleagues who are here today to introduce the nominees.

Today, we will first welcome Ms. Caitlin Halligan, nominated to

be a judge on the D.C. Circuit. Ms. Halligan currently serves as general counsel for the New York County District Attorney's Office and as an adjunct faculty member at Columbia Law School. She will be introduced by her home State Senator, Senator Charles Schumer. And we also have a statement for the record from Senator Kirsten Gillibrand.

I now yield to the Ranking Member to make his comments.

Senator Grassley.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR
FROM THE STATE OF IOWA

Senator GRASSLEY. Obviously, as you have, I welcome our nominees and our colleagues who will introduce them, and, particularly, to families who are very proud of these nominees and could be here with us today.

At last week's markup, I said I intended to work in a cooperative manner with the chairman. My approach will be to carefully review the qualifications and records of nominees referred to this committee. We can move forward with consensus nominees after that thorough review.

I want to ensure that the men and women who are appointed to a lifetime position in our Federal judiciary are qualified to serve. Factors I consider important include intellectual ability, respect for the Constitution, fidelity to the law, personal integrity, appropriate judicial temperament, and professional competence.

Above all, I believe judicial nominees need to understand the proper role of a judge and our system of checks and balances. Judges are to decide cases and controversies, not establish public policy or make law. Therefore, I will not be favorably disposed to nominees who might bring a personal agenda or political ideology to the bench.

Nevertheless, in the spirit of cooperation, I am working with the Chairman and we are moving forward. There certainly is no credible complaint about Republican delays regarding these seats.

The same is true for circuit court nominations. Nominations to the D.C. circuit are and have been political. Many view this court as second in importance only to the Supreme Court. The Court of Appeals for the D.C. Circuit hears cases affecting all Americans, is frequently the last stop for cases involving Federal statutes and regulations, and, as we all know, judges who sit on this court are frequently considered for and have been elevated to the Supreme Court.

So there is a lot at stake with nominations to this court. This seat became vacant with the elevation of John Roberts as Chief Justice of the U.S. Supreme Court in September 2005. Peter Keisler was first nominated for the seat in June of 2006. His nomination stalled in Committee in both the 109th and 110th Congresses.

Mr. Keisler was imminently qualified to serve on that court. He had a distinguished academic and professional record. His public service included serving as acting attorney general.

At the time of his hearing, Democrats objected to even holding a hearing for the nominee. One of my colleagues on this Committee summarized the threshold concerns this way. He stated, "Here are the questions that just loom out there. One, why are we proceeding so fast here? Two, is there a genuine need to fill this seat? Three,

has the workload of the D.C. circuit not gone down? Four, should taxpayers be burdened with the cost of filling that seat? Five, does it not make sense, given the passion with which arguments were made only a few years ago, to examine these issues before we proceed?"

I have not heard these concerns expressed by my colleagues on the other side with respect to nominations that are before us now. These issues have not gone away. I have great concern about the need to fill existing vacancies on the D.C. circuit.

I hope that, at some point, we can spend time on carefully examining the workload of this court and the implications they may have. Not only do we need to examine the threshold issue, but we must carefully review the qualifications of nominees to this court. This Committee has multiple precedents establishing a heightened level of scrutiny given to nominees for the Court of Appeals of the D.C. Circuit.

President Bush nominated Miguel Estrada, John Roberts, Tom Griffith, Brett Kavanaugh, Peter Keisler, and Janice Rogers Brown. All had a difficult and lengthy confirmation process. This included delays, filibusters, multiple hearings, and other forms of obstruction.

I think the record shows President Clinton's nominees fared much better. I know that Justice Kagan was not confirmed for the D.C. circuit, but she was nominated late in President Clinton's second term, and things seemed to work out for her in the long run. Perhaps some of President Bush's failed D.C. circuit nominees will find a similar fortune in the future.

We have much to look at with this nomination beyond the qualifications of the nominee. I hope that we will be given a fair opportunity to fully examine those issues as we move forward. The D.C. circuit vacancy is not a judicial emergency, so I trust there will be no need to rush the consideration of this potentially unnecessary seat.

Thank you, Mr. Chairman, for your courtesies, and, again, I welcome the nominees.

Senator COONS. Thank you very much, Senator Grassley.

I would like to thank all of the Senators who have come to join us today to speak on behalf of their home state nominees. I know you are very busy, but your presence and personal support speaks volumes about their qualifications and the importance of filling these vacancies.

We will first hear from the Senator from the State of New York to introduce Ms. Halligan, Ms. D'Agostino, and Mr. Feighery.

Senator SCHUMER. Mr. Chairman, I know my colleagues have an important engagement. So if I might defer and we can hear from them and then go to me, that would be OK with me.

Senator COONS. Senator Schumer, I would be happy to do so.

Senator SCHUMER. Much as I would like to answer Senator Grassley's remarks, I will defer.

Senator COONS. Thank you very much, Senator Rubio. Thank you very much, Senator Nelson. I know you both have pressing business of the Senate to attend to. Thank you for contributing those statements today in support of your home state nominee.

We will now turn to the senior Senator from the State of New York, who will introduce for the panel today Ms. Halligan, Ms.

D'Agostino, and Mr. Feighery.

Senator Schumer.

PRESENTATION OF MAE D'AGOSTINO, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF NEW YORK; TIMOTHY J. FEIGHERY, NOMINEE TO BE CHAIRMAN OF THE FOREIGN CLAIMS SETTLEMENT COMMISSION; AND CAITLIN JOAN HALLIGAN, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT BY HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Well, thank you, Chairman Coons. And I want to thank you, too, all of our nominees who are here today, along with their very proud families.

I am honored to have three outstanding nominees to introduce today; one who was born, raised, educated and still lives in New York; one who came to New York as an adult from Ohio and has dedicated her career to public service in our state; and, one who was born and raised in New York and then, perhaps under duress, left.

Finally, it is my great honor today to introduce President Obama's first nominee to the United States Court of Appeals for the District of Columbia, Caitlin Halligan.

I would just add that the court now, if you are looking at those kind of things, Senator Grassley mentioned it, is not really in balance, only three Democratic nominees and eight Republican. And to say that we do not need more people on it, well, my colleagues on the other side of the aisle voted to fill the 10th and 11th seats repeatedly when they were empty.

So to now all of a sudden say, well, we only need a few less is a little perplexing, because the workload of the court has not decreased. Anyway, we will not get into that today. I am sure there will be time.

I would like to focus on the quality—quality—of this nominee. Caitlin Halligan was born in Ohio, I believe it was Xenia, Ohio. It is one of my favorite places, because there are very few that begin with an X.

But I think we can call her New Yorker now for her extensive service to the state. And it is her years of extraordinary public service that I want to emphasize today. Without a doubt, Caitlin has sterling academic credentials. She graduated cum laude from Princeton University and received her law degree magna cum laude from Georgetown University Law Center, where she was Order of the Coif. I did not get it, so I do not know how to say it—Order of the Coif, and managing editor of the Georgetown Law Journal.

After graduating, she clerked for Judge Patricia M. M. Wald of the D.C. circuit and then for Justice Stephen Breyer.

She began her legal career in private practice, including at Howard, Smith & Levin in New York, and then joined the state attorney general's office. Her first job was protecting consumers against Internet-based abuses. She headed up the Internet bureau of the attorney general's office, where she litigated online trading fraud and a variety of consumer protections.

She then became the first deputy solicitor general for the State of New York, and then solicitor general. In this capacity, she was

the state's lawyer in chief in the appellate courts. She formulated legal arguments to advance the State of New York's interests in cases ranging from the interstate shipment of wine to the role of dual regulation between state and local governments.

Caitlin has argued four cases in the U.S. Supreme Court, where she won two and lost two, another sign that she is very well balanced. She won the Best Brief Award.

Chuck was not listening to that. I said she was well balanced, because she won two cases and lost two cases in the Supreme Court.

Senator GRASSLEY. A lot better than the ninth circuit, for sure. [Laughter.]

Senator SCHUMER. Well, thank you, Chuck. She won the Best Brief Award from the National Association of Attorneys General for 5 consecutive years during her 8 years of service.

Most recently, Caitlin was in private practice at Weil, Gotshal & Manges in New York City, where she headed up the firm's prestigious appellate practice. She is currently the general counsel to the New York County District Attorney Cyrus Vance. In this capacity, she recently authored a brief in the U.S. Supreme Court to support New York's use of traffic stops.

The D.C. circuit has been called the second highest court in the land because of the number of cases it decides regarding the extent and limits of government power. I think that a remarkable thing about Caitlin is that she comes to a position on the D.C. circuit with a unique depth of knowledge about the practicalities of government. I always worry about judges who have not had practical experience and seek to impose from on high some decisions that just do not work in the real world. We are not going to find that with Ms. Halligan.

As solicitor general for the State of New York, she has had a massive client—I have never heard New York State referred as massive, but maybe so—with an extensive policy agenda and many priorities completed with very limited resources.

She defended the state, and, often successfully, up to the Supreme Court. A lawyer who is rigorous, but reasonable in representing her client is, I think, likely to be a rigorous and reasonable judge who similarly serves the rule of law.

Caitlin fits this bill and I think her experience and intelligence should recommend her highly to this committee, whatever party or ideology you come from.

I want to thank the nominees for their work and dedication.

I thank the Chairman for giving me this time today to talk about three nominees who have close connections to my home State of New York.

Senator COONS. Thank you very much, Senator Schumer, for those valuable and detailed introductory comments on the three nominees with some relationship with the State of New York. So thank you. And I know that you, too, have Senate business to which you may want to attend.

We are going to proceed now, if we could, with the first panel, which will consist solely of—

Senator Whitehouse. Mr. Chairman, with your permission, could I just add a good word, also, on behalf of Caitlin Halligan, who

comes very well recommended by the leadership that I am familiar with, the law enforcement community in New York.

As the state's former solicitor general and as a real leader in the appellate practice, she is perfectly suited for this court, and has received just rave reviews from our colleagues in the New York law enforcement community, particularly the district attorney for Manhattan, District Attorney Vance.

I wanted to pass on the very, very strong comments I have received in her favor as a tough prosecutor and a brilliant lawyer and a very capable individual.

Senator COONS. Thank you, Senator Whitehouse.

If I might, I would like to invite Ms. Halligan to step forward, if you would, at this time. Ms. Halligan, if you would, remain standing, raise your right hand, and repeat after me.

[Nominee sworn.]

Senator COONS. Thank you very much. Please be seated.

Ms. Halligan, I would welcome you, at the outset, to acknowledge any family members or friends you may have with you today, and then proceed with your statement.

STATEMENT OF CAITLIN JOAN HALLIGAN, NOMINEE TO BE UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

Ms. HALLIGAN. Thank you, Senator.

I would like to introduce my daughter, Anna Falcone; my husband, Marc Falcone; my father, Jack Halligan; my mother and father-in-law, Richard and Mimi Falcone. And I also have a number of other friends who are here to be supportive today. Thank you.

Mr. Chairman, thank you and the members of the Committee for being here today. I also want to thank the President for the extraordinary privilege of nominating me to this position.

And I want

to thank Senator Schumer and Senator Whitehouse for their very generous comments.

Other than that, I have no statement and would be happy to answer the committee's questions.

Senator COONS. Thank you, Ms. Halligan. We will proceed then to questions, if we might. I am still expecting the Chairman to join us for an opening round of questions, but I will begin, if I might.

Ms. Halligan, if you might start by just briefly describing your judicial philosophy, that might be helpful for all of us.

Ms. HALLIGAN. Senator, I believe that the role of a judge is a limited, but important one. I think that the job is to apply the law to the facts, to do so in the context of a specific case that is presented to a court.

I believe that judges have to have a deep respect for precedent and, also, a full commitment to being fair and impartial with every case that comes before a judge.

Senator COONS. That is helpful. Thank you. And you have spent the vast majority of your legal career as an advocate. If confirmed for the D.C. Circuit Court, in your view, based on that philosophy, how would your role as a judge be different from that of an advocate?

Ms. HALLIGAN. I think the role is very different, Senator, and thank you for the opportunity to address that issue.

I believe that the role of an advocate is to make the very best arguments that you can that have a reasonable basis on behalf of

your client, whether you agree or disagree with those positions. I think that by contrast, the role of a judge is to look at every case with an open mind, to look at what the text in front of you says and the precedent, and to make the best decision that you can in accordance with the law.

Senator COONS. Thank you. In reviewing the background for this hearing today, I read, in particular, about a report that was issued by the Federal Courts Committee of the New York City Bar.

It was entitled “The Indefinite Detention of Enemy Combatants,” and further titled, “Balancing Due Process and National Security in the Context of the War on Terror.”

I was a little concerned about this report, in particular, to the extent that it seemed to conclude the United States lacks the authority to detain folks who are considered enemy combatants, and I know you served on that Committee at the time the report was issued.

If you could tell me something about your role in writing this report, whether you affirmed it or agree with it, and then, if possible, something about your view of the impact of terrorism on our communities and the importance of appreciating and respecting that impact, as you have conducted yourself in your recent legal roles.

Ms. HALLIGAN. Thank you, Senator. I am really grateful to have the opportunity to address that report.

I first became aware of the existence of that report this summer, when I went to the City Bar Association. In responding to this committee’s questionnaire, I wanted to make sure that I had done full diligence, and I knew that I had been a member of the Committee that you referred to.

And so I went through the bar association’s files and I discovered this report. I was, frankly, taken aback by it, for a couple of reasons.

First of all, the Supreme Court has clearly held that indefinite detention is authorized by the AUMF statute. And so the notion that the President lacks that authority, I think, is clearly incorrect.

I also was a little bit taken aback by the tone of the report. I think that the issues of indefinite detention and any issues in the national security realm are very serious ones, and I think that approaching those issues as respectfully as possible is the most productive way to proceed.

But the bottom line is that the report does not represent my work. It does not reflect my views.

Senator COONS. And, Ms. Halligan, have you had any personal experiences that give you some exposure to the strains or challenges in law enforcement, in the legal process, or in our community that are a result of acts or incidents of terrorism?

Ms. HALLIGAN. In several regards, Senator. You know, at a personal level, I live and work in downtown Manhattan and I worked two blocks away from the World Trade Center on September 11.

And so I have a very acute awareness of how serious these issues are and how important the task of protecting our citizens is. It is something that I think you cannot live and work in New York without thinking about on a frequent basis.

And I have actually spent a fair amount of time during my time in private practice working on a pro bono basis to assist the organization that is tasked with rebuilding the 9/11 site. So I have

worked very closely and, in the course of doing that, gotten an upfront understanding of just how devastating the consequences of that attack here, even 10 years down the road.

I also now work in the district attorney's office and although the work of counterterrorism is primarily work that is done by the Federal Government, we also attempt to do our part to make sure that any issues that we identify are addressed as quickly and responsibly as possible. And so I think that my work on the law enforcement side has also made me very aware of how serious the challenges are that we face.

Senator COONS. Thank you, Ms. Halligan.

I will turn to Senator Grassley for his first round.

Senator GRASSLEY. Thank you very much.

I want to ask you some questions that would try to find out whether you believe the Constitution is original intent or evolving. And since you were involved in some briefs dealing with the Eighth Amendment, do you personally believe that the meaning of the Eighth Amendment has changed over time?

Ms. HALLIGAN. Senator, I believe that the Constitution is an enduring document and I believe that the best way in which we can interpret it is to look to the text and the original intent of the framers.

Senator GRASSLEY. And, obviously, that original text, at least going back to the amendments of 1792, provide for the death penalty.

Ms. HALLIGAN. It does, Senator, and I have defended the death penalty in New York's courts under constitutional challenge.

Senator GRASSLEY. In one of your statements, you had said something about the meaning of the Constitution depends on whether there is an enduring legislative consensus, and you quoted in one brief that 18 states expressly disallowed the death penalty for juveniles and 12 states did not permit the death penalty under any circumstances. So it seems to me, under your reasoning, you might believe that if 30 states ban the death penalty entirely, then the punishment would be unconstitutional. In other words, the legislatures acting in one way or another kind of changes the Constitution.

Ms. HALLIGAN. Senator, that brief was filed on behalf of a client, the State of New York, and it doesn't represent my personal views. I believe the Supreme Court has been crystal clear that the death penalty is constitutional, and I would fully follow those precedents, if I were lucky enough to be confirmed to the D.C. circuit.

Senator GRASSLEY. OK. Then I am going to ask a question that comes from the same briefs and series of cases, but it does not deal with the issue of the death penalty or not, even though the cases deal with it. But it is kind of from the standpoint that you referred to the Atkins case, and you cited it when you filed on Roper, and you cited, "The United States now stands alone in the world that has turned its face against juvenile death penalty."

And the majority stated, "Within the world community, the imposition of the death penalty for mentally retarded offenders is overwhelmingly disapproved." It is not whether or not people that are mentally retarded ought to have capital punishment or juveniles.

It brings me to this point. Do you believe it is ever appropriate to rely on foreign law in deciding the meaning of the U.S. Constitution?

Ms. HALLIGAN. I do not, Senator.

Senator GRASSLEY. Well, that is pretty clear. So I will not have

to follow-up with another question I had on that subject.

On the Second Amendment, in 2003, you gave a speech expressing concern about Federal legislation to limit the liability of gun manufacturers. You said, “Such an action would likely cutoff at the pass any attempt by states to find solutions through the legal system or their own legislatures that might reduce gun crime.”

Many who oppose the Second Amendment rights made similar arguments against after the Supreme Court decided Heller. Do you personally agree that the Second Amendment protects individual rights to keep and bear arms?

Ms. HALLIGAN. The Supreme Court has been clear about that.

Yes, it does protect individual rights to bear arms, Senator.

Senator GRASSLEY. And would you say that making it a fundamental right under McDonald was something you agree with, as well?

Ms. HALLIGAN. That is clearly what the Supreme Court held and I would follow that precedent, Senator.

Senator GRASSLEY. Thank you. Do you believe it is proper for a judge, consistent with governing precedent, to strike down an act of Congress that is deemed unconstitutional and what might be those circumstances?

Ms. HALLIGAN. Senator, thank you for the opportunity to address that. I think that the job of a judge is to examine the constitutionality of a statute when a constitutional challenge is presented,

but I think that that authority has to be exercised very sparingly and very carefully.

I think particularly my experience defending a state government against a wide range of constitutional challenges on different issues has taught me just how serious an act it is for a judge to strike down a statute and, therefore, set aside the will of the people that are acting through their representatives.

Senator GRASSLEY. I think you are giving great deference in your response to legislatures deciding public policy as opposed to judges.

Ms. HALLIGAN. I believe that is absolutely the province of the elected branches, Senator, yes.

Senator GRASSLEY. Then let me ask you to comment on a speech in 2005 that Justice Scalia said this, “Every time the Supreme Court defines another right in the Constitution, it reduces the scope of democratic debate.”

So do you think that Justice Scalia might be saying something you would agree with?

Ms. HALLIGAN. I think that courts should be very careful about striking down any statute that is enacted by a legislature.

Senator GRASSLEY. It sounds to me like you believe that the Federal Government is one of limited enumerated powers, but I would like to have that clearly stated.

Ms. HALLIGAN. Thank you, Senator. Yes. The Supreme Court has been clear about that point in Lopez and Morrison, and the Constitution indicates that, as well, I believe.

Senator GRASSLEY. Let me ask two short questions, please.

Senator COONS. Certainly.

Senator GRASSLEY. My time is up, I see.

Senator COONS. Certainly.

Senator GRASSLEY. Do you believe that all powers not specifically

delegated in the Federal Government are reserved to the states, according to the Tenth Amendment?

Ms. HALLIGAN. Yes, Your Honor, that is what the text—sorry—Senator, that is what the text says.

Senator GRASSLEY. Now, just as an opportunity to have you think about, if we are a government based on enumerated limited powers and the Federal Government is limited by the Tenth Amendment, could you give me an example of an activity that the Federal Government does not have the authority to regulate?

Ms. HALLIGAN. Well, I think the Supreme Court addressed that in Lopez, for example, when it said that Congress could not regulate, I believe—it has been a while since I read the decision, but I believe it was the possession of guns in school zones, and that was an example of where, in the court's opinion, Congress had transgressed its authority.

Senator GRASSLEY. And you know that is probably about the only commerce clause case where the courts have restricted the Federal Government under the commerce clause, as well. I hope there are more of them. But you at least see that as one of those. OK.

Senator COONS. Thank you, Senator Grassley.

We now turn to Senator Blumenthal. Senator?

Senator BLUMENTHAL. Thank you, Senator Coons. And welcome to you and your family. And I would like to say how impressed I am not only with your experience in public service and your experience in litigation, but, also, in the appellate practice, which is a somewhat specialized area; obviously, very germane and relevant to the position that you have been nominated to fill.

Just to follow-up on some of Senator Grassley's very excellent questions. In your representation of the State of New York and now the district attorney's office, very often, you are in the position of either defending or advocating positions that are those of your client, and I assume that your views are separate and distinct from whatever positions have to be taken——

Ms. HALLIGAN. Thank you.

Senator BLUMENTHAL. [continuing]. To advocate the positions of those clients.

Ms. HALLIGAN. Thank you for your kind remarks, Senator. Yes, that is correct. My work on behalf of the State Government of New York, as well as in the district attorney's office, as well as my work on behalf of clients in the private sector, represents the work of an advocate, to make the best arguments possible, and not my personal views at all.

Senator BLUMENTHAL. And I might actually note, on a personal level, that as attorney general, I was on the opposite side of a case that reached the court of appeals in New York challenging the constitutionality of the New York commuter tax, and your office, under your leadership, was very vigorous and excellent in its advocacy, fortunately, on the losing side of that case.

[Laughter.]

Senator BLUMENTHAL. But I know that in that instance and others, your personal views may have differed from the State of New York, but you were very zealous and vigorous in advocating it. And I assume that now that you would be assuming a judicial position, your goal would be to follow the law, not necessarily your own personal

beliefs.

Ms. HALLIGAN. That is correct, Senator. I have great respect for the rule of law and I think my experiences as an advocate have taught me that it is really important that every judge leave their personal views at the door when they come into the courtroom. So I would strive my best to do that.

Senator BLUMENTHAL. Thank you very much.

Thank you, Mr. Chairman.

Senator COONS. Thank you, Senator Blumenthal.

We now turn to Senator Kyl. Senator?

Senator KYL. My colleague, Senator Lee, was here before I was, but you are going to by seniority rather than presence.

Senator COONS. That is my understanding, yes.

Senator KYL. Then if my colleague does not mind, thank you.

Thank you.

Could I, first of all, ask you, when you talked about the New York City Bar report, you said, "It does not reflect my views." Was that just with respect to the indefinite detention of enemy combatants issue or other aspects of that report?

Ms. HALLIGAN. Senator, the issues that that report touched on are not ones that I have studied closely. What was clear to me is that that point, in particular, was flatly contradicted by the Supreme Court.

I must say I do not really have clear views about a range of the other issues raised in the report, but I certainly do not agree with them and it does not reflect my work or my views.

Senator KYL. But you were a signatory to the report; is that correct?

Ms. HALLIGAN. Senator, I was a member of the committee. I have no recollection of being apprised of the fact that the report was being drafted, and I clearly should have paid more attention to that and would not agree to serve on a Committee like that in the future unless I could be full apprised of the work that it was conducting.

But I learned about it for the first time this summer.

Senator KYL. Well, is your signature affixed to it or your name listed as an approver of the report in any way?

Ms. HALLIGAN. When I identified the report this summer, the report indicates that it comes from the Federal Courts Committee.

There is a list of names at the end and mine is one them, which reflects my membership on the committee.

Senator KYL. Do you remember participating in any of the deliberations of the committee?

Ms. HALLIGAN. Not with regard to this report. I did not even recall that it had been written. I was very surprised when I saw it.

Senator KYL. So it is accurate to summarize that you do not remember participating in any of the deliberations of that Committee relative to the report that we are talking about of 2004.

Ms. HALLIGAN. That is correct, Senator.

Senator KYL. And let me just ask you if, prior to this hearing, you took the opportunity to make that point or to criticize any aspect of the report.

Ms. HALLIGAN. No, Senator.

Senator KYL. Let me ask you about another matter that is covered by the report that has to do with the military commissions, because you have expressed opinions about military commissions.

One is the report's conclusion that it is illegal or it should be illegal for the use of military commissions to try alien terrorists for violations of the laws of war. In fact, the report talks about—it says it seems self-evident that the constitutional protections afforded ordinary criminals should presumptively extend to these terrorists. Do you agree with that conclusion or is that part of the language you said that you wanted to distance yourself from?

Ms. HALLIGAN. Senator, my understanding—again, I am not well versed in this area, but my understanding is that the Supreme Court said in Hamdan simply that the military commission procedures that were set up by President Bush shortly after 9/11 were simply inconsistent with Federal statute, not that they were unconstitutional. I believe——

Senator KYL. That is correct. So the question then is with regard to the report's conclusion that it would be unconstitutional to have military commissions, per se, trying these terrorists for violations of laws of war, my question is whether you disagree with that conclusion, as well.

Ms. HALLIGAN. Senator, my understanding is that the current law, enacted in 2009, provides for review of actions by military commissions by the D.C. circuit. So I think it would be inappropriate to comment on that precise question, but I would take my guidance from the Supreme Court's precedent in Hamdan and any other cases which it decided that were relevant to this point, if I were confirmed.

Senator KYL. When you were practicing, you coauthored an amicus brief in the al-Marri case, and it argued that the use of military force authorization that Congress passed did not authorize the seizure and indefinite military detention of a lawful permanent resident alien who was alleged to have conspired with al-Qaeda to execute terrorist attacks on the United States.

Is that a personal view of yours?

Ms. HALLIGAN. No, Senator. That was a brief that—I was not the primary author of the brief, but it was filed on behalf of a client. It does not represent my personal views.

Senator KYL. All right. Do you have a personal view on that issue?

Ms. HALLIGAN. I do not, Senator.

Senator KYL. Understanding that some of the 9/11 hijackers came to the United States under legal visas, do you think that a credible argument can be made for the proposition that an authorization of the use of military force would not include the ability to seize and to hold such terrorists indefinitely?

Ms. HALLIGAN. As a citizen, Senator, that seems like that might be difficult. If I were a judge sitting on a court considering that question, I would have to put that personal sensibility to the side and look at the law.

Senator KYL. Since my time is up, let me just make a point. Obviously, we have 5 minutes, we are trying to get right to the point on something. But for those in the audience, there is a clear possibility that people who appear before the Committee express views that they believe the Committee want to hear rather than necessarily what their own attitudes toward judging would be.

We have seen that happen in the past, and that is why we try

to delve into questions that might reflect on your ability to decide cases before you objectively as opposed to from the position of preconceived notions. I am sure you can appreciate that is the reason for some of the questions that you see asked today, and that is the foundation for my questions.

Ms. HALLIGAN. Senator, thank you. I appreciate that, and I do believe that I have had the opportunity to consider a wide range of cases on different issues and I think that whatever my personal views are, I would need to leave those to the side, if I were confirmed.

Senator KYL. Incidentally, just as a matter of clarity, you are not required to argue an amicus brief position. That is something you voluntarily agree to do. Is that not correct?

Ms. HALLIGAN. That was a decision that was made by the attorney general and any work I did on those briefs was under his direction, Senator.

Senator KYL. I see. Thank you very much.

Ms. HALLIGAN. Thank you, Senator.

Senator KYL. Thank you, Mr. Chairman.

Senator COONS. Thank you, Senator Kyl.

Senator Lee.

Senator LEE. Thank you. I wanted to open just by responding to something made by my colleague from New York a few minutes ago with respect to the caseload within the D.C. circuit.

It is my understanding, based on data I have, that if anything, the caseload of the D.C. circuit has decreased rather than increased over the last few years since 2006.

Nonetheless, we are here to discuss this nominee and will proceed right to that.

Thank you very much for joining us. I wanted to open our discussion by just talking about the importance of dispositive motions. As an attorney, I have sometimes had a frustration or a few that there might be some tendency among judges to want to deny dispositive motions instinctively.

I have wondered whether you could almost call this a form of defensive jurisprudence.

As a judge, after all, it is easier to deny a motion for summary judgment or a motion to dismiss than it is to grant it. If you grant it, you are normally going to throw in an opinion. That opinion might be immediately appealable. You might get overturned.

Whereas, if you deny the same motion, then the parties might settle on their own and it results in a form of trial by attrition.

Is this a practice that you may have seen as an attorney from time to time? Is it one that is troubling to you?

Ms. HALLIGAN. As a litigant, I can empathize with that sense of frustration. I think that those are issues that are generally confronted in the first instance by the district courts. And if I were confirmed to an appellate court, I would apply the standard for reviewing any such decisions that was set forth in precedent.

Senator LEE. And I guess that feeds into my next question, which is you, as an appellate judge, would have the opportunity to review these and to scour the records to see where that would happen.

I would assume you would be on the lookout for such instances so that you could discourage that from happening.

Ms. HALLIGAN. Yes, Senator.

Senator LEE. I would like to talk to you briefly about a statement made by Alexander Hamilton in Federalist No. 78 that relates to the role that you would be playing, should you be confirmed to this judgeship.

In No. 78, he said, “The courts must declare the sense of the law and if they should disposed to exercise will instead of judgment, the consequence would be equally the substitution of their pleasure to that of the legislative body.” In other words, he is drawing this dichotomy between something he calls “will,” the prerogative of the legislature, to judgment, the prerogative of the courts.

What do you think he is talking about there? What is “will” and what is “judgment?”

Ms. HALLIGAN. It has been a little while since I have read Federalist 78, but from your comments, what I believe that he is talking about is the importance of judges confining themselves to deciding cases on the facts and leaving policymaking for the branches that are constitutionally authorized and, also, best equipped for doing so, which is the legislature and the executive branch.

Senator LEE. Thank you. I wanted to follow-up on Senator Grassley’s question from a few minutes ago about providing examples revealing the fact that the Federal Government is one of limited enumerated powers.

I assume you would agree that the Federal Government was designed to be one with few and defined powers, whereas the states were intended to retain powers that were broader and without comparable limitations.

Ms. HALLIGAN. The Constitution says that it is a government of limited powers.

Senator LEE. In light of that, Senator Grassley asked you a question of whether you could provide an example or a few examples of things that government might want to do, but that shouldn’t be done and can’t be done at the Federal level consistent with that enumerated powers concept. You mentioned Lopez.

Outside of the context of Lopez and Morrison, which, as far as I am aware, are the only two instances in the last 75 years where the court has invalidated something Congress has done under the commerce clause, any examples, hypothetical or otherwise, that you can point to of where Congress might step out of its limited role?

Ms. HALLIGAN. I think that is hard to say, Senator—thank you for the question—especially without the benefit of some further facts or some area in which Congress might legislate.

Senator LEE. Could Congress legislate that I need to eat four servings of green, leafy vegetables in one day?

Ms. HALLIGAN. Sometimes I think I should do that in my own house, Senator.

Senator LEE. Would it be appropriate legislation for your children, I should ask?

Ms. HALLIGAN. It might be. I think that if Congress were to enact a statute like that, a court would properly look at the Supreme Court’s decisions in Lopez and Morrison and look at the reasons that Congress had enacted the statute and decide, as best it could, whether or not it had transgressed its powers.

Senator LEE. Can you tell me anything about what your instinct would be on that? Does that strike you as economic activity or noneconomic

activity? Let us assume that Congress made findings of fact showing that Americans were more likely to consume more health care, health care that might have to be provided by the Federal Government, if they did not eat green, leafy vegetables four times a day.

Ms. HALLIGAN. Senator, I think, in the abstract, it is hard to say. I think that that is the sort of question that would be best resolved with the benefit of a statute and briefing and argument.

Senator LEE. So you see no glaring problem with that that strikes out at you off the page. You would have to examine it in context.

Ms. HALLIGAN. I think as with any statute, you would need to look at it in context.

Senator LEE. Understood.

Ms. HALLIGAN. Thank you, Senator.

Senator LEE. Thank you.

Thank you, Mr. Chairman.

Senator COONS. Thank you, Senator.

We now begin the second round of questions, Ms. Halligan. The concept of federalism holds that Federal legislation is entitled to supremacy, to follow-up on the conversation you were just having, whereas the Federal Government is empowered to act and state authority is supreme in other areas.

In areas where both levels of government are empowered to act, courts are often called upon to resolve whether Federal action preempts related state law, and that is an area of law in which you have practiced fairly extensively.

If faced with a similar question of Federal preemption, how would you go about deciding whether state law should be enforced, should you be confirmed to the D.C. circuit?

Ms. HALLIGAN. Thank you, Senator. I think with any preemption case, the touchstone is what did Congress intend. If Congress intended to preempt state law, then the state law has to be set aside.

And so I would look at the Federal statute and I would look at, as the precedent directs, the purposes that it was intended to achieve, and I would follow the Supreme Court's precedent in that area.

Senator COONS. There was a conversation previously. I asked in the first round about the Federal Courts Committee of the New York City Bar. Just to be clear, how many members were there of that committee? Do you have a sense?

Ms. HALLIGAN. I believe there were about 45, give or take a few. I would want to check to give you a precise number, Senator.

Senator COONS. And last, what are the most important lessons you have learned? As other Senators have commented, you have got a broad and long experience in public service in the law. What are the lessons you have learned in those respective positions and how would you apply those lessons as a Federal circuit court judge?

Ms. HALLIGAN. Thank you, Senator. I think that from my experience in private practice, as well as my experience in public service, I have had the opportunity to litigate a lot of cases on a lot of different issues, and what that has taught me is, first of all, that it is critical that judges come to cases with an open mind, that they be fair and that they be impartial, and, also, that they be respectful to the litigants that are before them.

It has also led me to believe that it is very important for judges to decide cases narrowly on the facts before them and to give guidance that is as clear as possible so that parties can plan their conduct going forward accordingly.

Senator COONS. Thank you. As I believe Senator Schumer and others have referenced earlier, I think one of the reasons that you are particularly well qualified for the D.C. circuit is the hands-on and practical experience you have had representing the State of New York and in other roles and sort of understanding the practical consequences of judicial decisions.

Could you just, in the last, if you would, explain for me the difference between the role of legal advocates and the role you perceive as a judge and exactly how you would rely on precedent in making decisions on the Federal circuit court?

Ms. HALLIGAN. Thank you, Senator. I think as an advocate, you look to precedent to see what reasonable arguments you can make on your behalf, whether those are winning arguments at the end of the day or not. And as part of that, I believe that you are pressing the position of your client to the very best of your abilities, whether that is a winning position or a losing position.

I think, by contrast, as a judge, you need to come to it without any agenda, without any interests, your clients or you own, at the table, and look to precedent to guide you to what the correct answer under the law is. And I think in most cases, there is a correct answer that the precedent directs you toward.

Senator COONS. Thank you, Ms. Halligan.

Senator Grassley.

Senator GRASSLEY. A couple of short questions in the follow-up on something you had a discussion on. I kind of tried to get your views on whether or not you believe the Constitution interpretation of original intent or—I used the word “evolving,” and you said that the Constitution is an enduring document.

What do you mean by the word “enduring” as opposed to—well, I should not say as opposed to anything else, because you used it.

Ms. HALLIGAN. What I mean by that, Senator—thank you for the opportunity to clarify that. What I mean by that is that we have a document that was written more than 200 years ago and it is those words in that document that endure today and that guide the decisions that judges must make when confronted with a constitutional question.

Senator GRASSLEY. My next question I think maybe you just answered, but I am going to ask it anyway. Do you believe that the Constitution is also an evolving document?

Ms. HALLIGAN. I am not sure what evolving means, Senator. I think that if faced with a constitutional question, a judge has to look to the text and attempt to understand the original intent behind those words.

Senator GRASSLEY. Thank you.

Senator COONS. Thank you, Senator Grassley.

Senator Blumenthal, any further questions?

Senator BLUMENTHAL. Thank you, Mr. Chairman. Just a couple of quick questions to follow-up on a point that was raised earlier by Senator Kyl concerning the amicus briefs that may have borne your name over the years.

My recollection is that you served as solicitor general for the attorney general's office in New York between the years 2001 to 2007; is that correct?

Ms. HALLIGAN. Yes, Senator.

Senator BLUMENTHAL. And that would cover the terms of Attorney General Spitzer and partly Attorney General Cuomo.

Ms. HALLIGAN. A short period of time in Attorney General Cuomo's administration, yes, Senator.

Senator BLUMENTHAL. And I served as attorney general of Connecticut during those years. My recollection is that they were very active and interested in whatever the subject matter was that could concern those amicus curiae briefs and that their say was not only final, but very often their initiative was what resulted in the New York State attorney general's office and the State of New York becoming an amicus in those cases; is that correct?

Ms. HALLIGAN. Yes. Those briefs were written and filed at the direction of the attorney general himself. That is correct.

Senator BLUMENTHAL. And just to follow-up on Senator Lee's excellent point about the workload, my recollection is, correct me if I am wrong, that the D.C. Court of Appeals actually was reduced in the number of judges by one in response to decreases in workload; is that correct?

Ms. HALLIGAN. Thank you, Senator. I do not really know about the workload statistics of the change in the number of judges on the D.C. circuit.

Senator BLUMENTHAL. I think that in 2008, the number of judges was reduced by one on that court and there are now vacancies for two, and you would be filling one of them. So that may respond, at least in part, to the point raised by—very legitimate point raised by Senator Lee as to trying to allocate judges to respond to workload shifts and changes.

Thank you.

Senator COONS. Thank you, Senator Blumenthal.

Senator Lee, do you have any remaining questions?

Senator LEE. Yes. Just a couple of quick follow-up points.

We were talking earlier about the need to look at Congress' limited power. In your opinion, as one who might be joining the D.C. circuit here shortly, is it worse to uphold the law passed in excess of Congress' power or would it be worse to invalidate a valid law? Is either one of those worse than the other?

Ms. HALLIGAN. Thank you, Senator. It is not a question I have really thought about, to be honest with you. I believe that a judge confronted with a question about whether a law exceeds Congress' commerce clause powers would really just need to look at the precedent and evaluate that particular statute as best as they could.

Senator LEE. Sometimes in criticizing a ruling invalidating a piece of legislation, people will say that is an act of activism. I guess my question is designed to get at are activism and passivism both ultimately a question of good judgment or bad judgment. If you are invalidating something that is bad, you are just doing your job. If you are upholding something that is within Congress' power, you are also just doing your job. So I assume you would not disagree with that point.

Ms. HALLIGAN. No, Senator. I believe that one of the jobs that judges are confronted with is to police the boundaries that the Constitution sets forth, and they need to do that.

Senator LEE. So invalidating a piece of legislation would not necessarily make you a bad activist judge. It might just mean that you are doing your job.

Ms. HALLIGAN. Absolutely, Senator, yes. Thank you.

Senator LEE. I wanted to ask you very briefly about a speech you gave on May 5, 2003 in White Plains, and you made a statement during that speech to the effect that courts are the special friend of liberty. Time and time again, we have seen how the dynamics of our rule of law enables enviable social progress and mobility. I was wondering if you could just share with us, with the committee, what you might have meant in suggesting that the law and perhaps the courts, in particular, can be used as a tool of social progress and how such a view might influence your role as a judge and how you might approach your job, if you were confirmed?

Ms. HALLIGAN. Senator, that was a speech—thank you. That was a speech that was given in the attorney general's stead. I do not recall, candidly, what was in my head when I made that particular remark, and I do not see any way in which it would affect my role as a judge one way or the other, were I lucky enough to be confirmed.

Senator LEE. Understood. Thank you.

Ms. HALLIGAN. Thank you, Senator.

Senator LEE. Thank you, Mr. Chairman.

Senator COONS. Thank you, Senator Lee.

Are there any members who have further questions?

Senator GRASSLEY. I presume I will submit some for writing.

Senator COONS. Seeing none, if there are no further questions, we will hold the record open for a week, if there are any members of this Committee who wish to submit further questions.

Again, I want to very much thank you, Ms. Halligan, for being here today, congratulate you on your nomination and your willingness to continue in a long and dedicated career of public service.

As Ms. Halligan and her friends and family are departing, we may take a brief 2-minute recess before the second panel.

Thank you.

Ms. HALLIGAN. Thank you, Senator.

Senator COONS. We stand in recess.

DAVID HAMILTON
WEDNESDAY, APRIL 1, 2009
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:30 p.m., room S-127, The Capitol, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Schumer, Whitehouse, Klobuchar, Kaufman, and Specter.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. It's now 2:30. I apologize to everybody for squeezing over here, but we're in the annual budget marathon. We're about to have a series of statements and votes upstairs. There are excellent nominees before us. David Hamilton, who is strongly supported by the two Senators from his home State, one of my best friends in the Senate and long-time friends because we go back a long time, the senior Republican of the Senate, Senator Lugar. Another distinguished Senator, Evan Bayh, from his State. So with that, I'll put my full statement in the record.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Mr. Chairman.

The Republican members of this Committee will not be participating because there has been insufficient time to prepare for this hearing. I ask that the letter I've sent asking for a postponement be made a part of the record, together with a letter signed by all the Republicans sent to you yesterday.

Chairman LEAHY. Without objection, it'll be part of the record. [The letters appear as a submission for the record.]

Chairman LEAHY. Also, the news article covering the first letter which appeared before I received the letter will also be made part of the record, and my response. I did not receive the letter, but yes it may be a part of the record. My response will be there, and the news articles detailing the letters before I received them will be made part of the record.

[The information appears as a submission for the record.]

Senator SPECTER. For all of those assembled, especially to the three nominees, I regret that there is a very strong conclusion that this position has to be taken. I personally find it very distasteful to raise these considerations in the Judiciary Committee, but I do so because of the conclusive nature of the record which shows that there has been grossly insufficient time to prepare.

And I'll be very specific about it. The nomination of Judge Hamilton—and before I go on, let me say that the academic and professional records of these nominees is exemplary.

Judge Hamilton, whose record I've examined, who, parenthetically, was a student with my son at Haverford. Shane Specter speaks very highly of you. But the chronology of events here really speaks for itself. Judge Hamilton's nomination was announced on March 17th. The Committee did not receive his questionnaire until March 18th. The questionnaire was not completed until March 24th. Judge

Hamilton has been a District Judge for almost 15 years and, according to his calculation, has authored roughly 1,150 written opinions, over 9,500 pages, and has submitted approximately 2,000 pages of speeches, articles, and public policy papers.

In the past, President Bush's nominees were submitted with Senators having, on average, 166 days to prepare for a hearing and 117 days to prepare for President Clinton's Circuit nominees. So on the procedural aspect, there has been just totally insufficient time to review these matters.

I'm not going to make a show of these boxes, but if I were to stack up the papers, they would be about four feet high on the desk. But I'm not going to do that. There is a special concern about this time sequence in light of the fact that Judge Hamilton's nomination is the first, and we're going to have many, many more.

The Constitution, as we all know, calls on the Senate to confirm. Indispensable to the confirmation process is an opportunity to examine the record of the individual, and that means a hearing, and that means questions and answers, and that means an opportunity to prepare.

So on process, I think the record is conclusive that we haven't been given a reasonable amount of time. I regret that very much on the personal level with Senator Leahy. It is well known he and I have been working together since 1970 when we were District Attorneys and worked coordinately on this Committee, more than 90 percent of the time cooperatively.

Now, beyond the issue of procedure and process, there are also substantial questions to be asked. Staff has prepared summaries of some of the cases that Judge Hamilton has engaged in. These questions, I think, fairly—these cases fairly warrant an examination.

But let me make a point: I don't necessarily disagree with anything you've done, Judge Hamilton. And that is not to say that I agree with it.

[Laughter.]

But I am raising issues for inquiry just by doing just that. But I can tell you that there are members of this Committee on the Republican side who do disagree with some of what you said, but I do not state that in raising these cases. *Heinrichs v. Bosma*. The case involved the practice of the Indiana General Assembly opening each session with a prayer. Judge Hamilton said that was unconstitutional; the Seventh Circuit reversed on the issue of—complex

issue. A lot to be said on both sides.

Women's Choice v. Newman. The rulings which you had handed down delayed a decision in that case for some 7 years. Ultimately, the Seventh Circuit reversed. Chairman Leahy is reminding me that there's a 5-minute rule, so I'll be as brief as I can.

Grossbond v. Indianapolis, Marion County Building Authority, question of a Hanukkah menorah. The Seventh Circuit again reversed.

Tough issues, First Amendment, require some examination.

Go v. Prosecutor. The issue involved registration as a sex and violent offender, also involving the consent of the search. Another complicated issue.

United States v. Woolsey. The statute required a life sentence.

Life sentence was imposed, with the additional statement that you disagreed with it and hoped that it would be reversed by executive

clemency. Okay. But it's worth some examination. United States v. Reinhart. You found a minimum mandatory sentence to be unjust, could not impose a just sentence in the case. Bolls Commas. Perhaps warranted, but certainly worthy of some inquiry.

Chairman LEAHY. Well, we will hear first from Senator Lugar, and of course anybody can ask any question you want.

I would note, parenthetically, there's going to be almost 4 weeks before any of these nominations are even on the agenda, so there will be time for further meetings and for any follow-up questions during those 4 weeks.

Again, I thank people for coming down here, as they did when I accommodated President Bush right after 9/11 on nominees that he wanted to get through on very, very short notice.

Senator Lugar.

Senator SPECTER. Mr. Chairman, I hadn't quite finished.

Chairman LEAHY. I apologize. I'll let you go for your round of questions. I know you have more and I can't wait to hear it.

Senator SPECTER. Well, I would like to just say one more thing, because I intend to leave. That is that it is common practice to have informal sessions with nominees. I would hope to not have to put you through eight or nine of those individually. I would hope that you would be willing, perhaps even volunteer, perhaps even urge another hearing, but I don't have the gavel anymore.

Thank you.

Chairman LEAHY. Senator Lugar. I do have the gavel. Senator Lugar, please go ahead.

PRESENTATION OF DAVID HAMILTON NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT BY HON. RICHARD LUGAR, A U.S. SENATOR FROM THE STATE OF INDIANA

Senator LUGAR. Thank you, Mr. Chairman, for this opportunity to join my friend and colleague, Evan Bayh from Indiana, in introducing Judge David Hamilton, whom the President has nominated to serve in the U.S. Court of Appeals for the Seventh Circuit.

Senator Bayh and I are proud that President Obama's first judicial nominee is from our State of Indiana and that he has chosen to elevate such an exceptionally talented jurist to the Federal appellate bench. I first had the pleasure of introducing David Hamilton to this Committee almost 15 years ago when he was nominated to the Federal District Court.

I said then that the high quality of his education, legal experience, and character well prepared him for this position and expressed my belief that his keen intellect and strong legal background will make him a great judge. This confidence in David Hamilton's character and abilities was shared by all who knew him, regardless of political affiliation, throughout Indiana's legal and civic communities.

Judge Hamilton's distinguished service on the U.S. District Court for the Southern District of Indiana, which he is now the Chief Judge, has more than vindicated that faith. I have known David Hamilton since his childhood. His father, Reverend Richard Hamilton, was our family's pastor at St. Luke's United Methodist Church in Indianapolis, where his mother was a soloist in the choir. Knowing firsthand his family's character and commitment to service, it has been no surprise to me that David's wife has borne

witness to the values learned in his youth.

He graduated with honors from Pennsylvania's Haverford College. While on a Fulbright scholarship to study in Germany at the University of Cologne, and earned his law degree at Yale. After clerking for Seventh Circuit Judge Richard Cudahy, David joined the Indianapolis office of Barnes & Thornberg, where he became a partner and acquired extensive litigation experience in the Indiana and Federal judicial systems.

When our colleague, Senator Bayh, was elected Governor of Indiana he asked David to serve as his chief legal counsel. Among other achievements, in that role David supervised the overhaul of State ethics rules and guidelines and coordinated judicial and prosecutorial appointments.

In the latter capacity, David worked closely with Judge John Tinder, then a Reagan appointee to the District bench, whom President Bush recently appointed to the Seventh Circuit with the unanimous support of this Committee and the full Senate.

When David was nominated to the District Court, Judge Tinder wrote to me that "David was meticulous in asking the difficult questions of, and about, judicial nominees," and that "his approach to these duties typifies the deliberate and sensitive way in which he approaches matters in his professional life." The same is true of David's approach to his judicial duties. Leading members of the Indiana Bar testified to his brilliance and, more importantly, his character, dedication, and fairness.

David Hamilton is the type of lawyer and the type of person one wants to see on the Federal bench. His colleagues on the Southern District of Indiana bench, a talented, exceptionally collegial group from both parties, unanimously endorsed these conclusions.

Allow me to close with a few further thoughts. Members may recall when I introduce now-Chief Justice Roberts to this Committee in 2005. My concern is that today's Federal judiciary is seen by many as a political branch, with the confirmation process often accompanied by the same over-simplification and the sources that are disturbing even in campaigns for offices that are, in fact, political. This phenomenon is most pronounced at the Supreme Court level and traces to several causes that I'll not try to address today, but I mention it, however, to underscore my commitment to a different view of judicial nominations which I believe comports with the proper role of the judiciary in our constitutional framework. I do not view our Federal courts as the forum for resolving political disputes that the legislative and executive branches cannot, or do not, want to resolve.

Our founders warned, in words quoted in my statement at the time of Chief Justice Roberts' nomination, against allowing "the pestilential breadth of faction to poison the fountains of justice," which they knew would stifle the voice both of law and of equity. This is why I believe our confirmation decisions should not be based on partisan considerations, much less on how we hope or predict a given judicial nominee will vote on a particular issue of public moment or controversy, and instead try to evaluate judicial candidates on whether they have the requisite intellect, experience, character, and temperament that Americans deserve from their judges, and also on whether they indeed appreciate the vital, and

yet vitally limited, role of the Federal judiciary faithfully to interpret and apply our laws rather than working to impose their own policy views.

I support Judge Hamilton's nomination, and do so enthusiastically because he is superbly qualified under both sets of criteria.

Finally, permit me to thank my colleague from Indiana on the thoughtful, cooperative, merit-driven attitude that has marked his own approach to recommending prospective judicial nominees from our State of Indiana. The two most recent examples are a strong support for President Bush's nomination of Judge Tinder for the Seventh Circuit, and of Judge William Lawrence for the Southern District of Indiana.

I am confident that Senator Bayh and I will continue to approach nominations by President Obama in the spirit that brings us before you today, and I thank you very much.

Chairman LEAHY. Thank you very much.

Senator Bayh.

PRESENTATION OF DAVID HAMILTON NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT BY HON. EVAN BAYH, A U.S. SENATOR FROM THE STATE OF INDIANA

Senator BAYH. Thank you, Chairman Leahy. I've had an opportunity——

Chairman LEAHY. Allow me to mention, all Senators, I know you've got a million other things. So if a Senator speaks and then leaves—a Senator speaks first and then leaves, that doesn't mean they no longer support you.

[Laughter.]

Senator BAYH. I know my friend and colleague has a busy schedule, but Dick, before you have to go, I just want to thank and commend you for that very thoughtful and eloquent statement. I, too, want to thank you for the exemplary manner in which you handled judicial nominations under President Bush. The spirit of cooperation, comity, consultation is one that I fully intend to continue throughout our service together. So, I thank you. Thank you for all of that, and so much more.

And Mr. Chairman, I have had an opportunity before to tell you how much I appreciate being before your Committee once again. It's a Committee that my father had the privilege of serving on for 18 years.

Chairman LEAHY. And chaired.

Senator BAYH. Indeed. So there's always been a fond spot in the Bayh family heart for the Judiciary Committee.

I am pleased, Mr. Chairman, to be before you again and to have this opportunity to introduce an individual for whom I have the greatest respect and admiration, Judge David Hamilton.

Before I speak to Judge Hamilton's qualifications, I would like to comment briefly on the judicial nominations process generally. In my view, this process has too often been consumed by ideological conflict and partisan acrimony. During the last Congress, I was proud to work with Senator Lugar to recommend John Tinder as a bipartisan, outstanding consensus nominee for the Seventh Circuit Court of Appeals.

Judge Tinder was nominated by President Bush and unanimously confirmed by the U.S. Senate by a vote of 93:0. It is my hope that Judge Tinder's confirmation would serve as an example

of the benefits of nominating qualified, non-ideological jurists to the Federal bench.

In selecting Judge Hamilton as his first judicial nominee, President Obama has demonstrated that he also appreciates the benefits of this approach. I was proud to once again join with Senator Lugar to recommend Judge Hamilton to President Obama. I hope that going forward other Senators will adopt what we call “the Hoosier approach,” working together to select consensus nominees.

On the merits, Judge Hamilton is an accomplished jurist who is well-qualified to be elevated to the Seventh Circuit Court of Appeals. He has served with distinction as a U.S. District Judge for almost 15 years, during which time he has presided over approximately 8,000 cases.

Since January of 2008, he has served as the Chief Judge of the Southern District of Indiana, where he’s been widely praised for his effective leadership style. Throughout his career, Judge Hamilton has demonstrated the highest ethical standards and a firm commitment to applying our country’s laws fairly and faithfully.

In recommending Judge Hamilton I have the benefit of being able to speak from personal experience, as I had the opportunity to work closely with him while I was Governor of our State. In his role as counsel to the Governor, Judge Hamilton helped me to craft bipartisan solutions to some of the most pressing problems facing our State.

In particular, he helped to favorably resolve several major lawsuits that threatened our State budget and drafted a tough new ethics policy to ensure that our State government was operating openly and honestly. In addition to his insightful legal analysis, I could always count on David for his sound judgment and commonsense Hoosier values he learned growing up in Southern Indiana.

During his service in State government, Judge Hamilton also developed a deep appreciation for the separation of powers and the appropriate role of the different branches of government. If confirmed, Judge Hamilton will bring to the Seventh Circuit a unique understanding of the important role of the States in the Federal system and will be ever mindful of the appropriate role of the Federal judiciary. He understands that the appropriate role for a judge is to interpret our laws, not to write them.

On a personal note, I have known Judge Hamilton for over 20 years. I know him to be a devoted husband to his wife and a loving father to his two daughters. He is the nephew of former Congressman Lee Hamilton, and the embodiment of good judicial temperament, intellect, and even-handedness. I have high confidence that, if confirmed, Judge Hamilton will be a superb addition to the Seventh Circuit Court of Appeals and I am pleased to give him my highest recommendation.

Mr. Chairman and other members of the Committee, it is my distinct pleasure to present for your consideration Judge David Hamilton.

Chairman LEAHY. Well, thank you. Thank you very much.

Chairman LEAHY. Thank you very much. We have a number of votes starting very soon and we’ll probably be on the floor. But let me ask Judge Hamilton, Ron Weich, and Chief Kerlikowske to stand and raise their right hands.

[Whereupon, the witnesses were duly sworn.]

Chairman LEAHY. Gentlemen, this is different than we normally do. I'm going to ask all three of you to step forward and I'll let the staff change the——

As Mr. Weich can remember, we were crowding right in here to expedite some—the rest of the building was closed down. We had more bipartisanship I guess at that time because Republicans didn't object to hurrying. I guess it's only more recently. I'm sure it has nothing to do with the change in the presidency.

But Judge, you have members of your family here, do you not?

Judge HAMILTON. I do.

Chairman LEAHY. Could you introduce them so it will be, someday, in the Hamilton archives?

[Laughter.]

STATEMENT OF DAVID HAMILTON, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT

Judge HAMILTON. Thank you very much, Mr. Chairman. It's a pleasure to be here. I'd also like to thank Senators Bayh and Lugar for their kind words of support and many years of friendship and support. I thank the President for his confidence in me.

With me today are many friends and family who have traveled here from Indiana: My wife, Inge van der Cruysse is here; my father, Dick Hamilton; my sister, Lisa Hamilton and brother, John Hamilton, are here. I wish that my daughters Janet and Debbie could be here, but work and studying in the Nation of Turkey has kept them away. And I wish my late mother, Anna Lee Hamilton—— Also with me are my aunt, Nancy Hamilton; my cousin, Sarah Schmidt; representatives from my wife's late husband's family who have adopted me as an extra in-law, Pat and Russ van Antwerpen and Kristin Gort; and also my long-term assistant, Jenny McGinnis; and my recently retired courtroom deputy, Chuck Bruess, are here. There are also many other friends and former or current law clerks and staff members who have made the trip. I'm grateful for all of them for having come here.

Chairman LEAHY. Judge, while we're here, I hope you have a chance of going to see the cherry blossoms, which has nothing to do with your—yesterday my wife and I were there right after 6 in the morning when the sun came up, there weren't that many people around, and just walked around there for an hour before I came up here. It is a lovely and unique time of the year. It's almost a cliché when people talk about cherry blossom time, but it is a very, very nice and very good time.

Judge, I've tried a lot of cases, as have many others on this Committee. I've also argued a lot of appellate cases, as have many others on this Committee. We have different judges. It's something you don't really—you can't write on a judge's handbook about how they should react, but I remember those judges who treated everybody who came before them with courtesy, treated everybody the same. When you walked in, you did not think, this is predetermined because of who I am, because of my background and my political party, or anything else. Can you assure us that you will be that type of judge?

Judge HAMILTON. I can. And I hope that the record that I've built up over the last 14-plus years as a District Judge reinforces that confidence.

Chairman LEAHY. Do you also understand the sense of having to recuse one's self depending upon a case? Can you give us some ideas of some of the things that might cause you specifically to recuse yourself from a case?

Judge HAMILTON. Well, recusing is governed by Section 455 of the Judicial Code, a statute I'm familiar with, along with the Codes of Conduct for the Federal Courts. We go through elaborate processes for disclosure of any financial interests we might have and parties that might come before us, and any kind of financial interest requires recusal. We have automatic procedures in place in our court, and I think in most other Federal courts, to prevent a judge from being assigned to a party—to a case in which a party would require that judge's recusal. So we try to minimize that as much as possible.

There are—there have been situations earlier in my career where I had to recuse in a number of cases because of pending litigation or ongoing legal relationships that stemmed from my work in private practice and with State government. When I became a District Judge I had proposed a method for dealing with that to the Judicial Conference Committee on Codes of Conduct. They endorsed the approach that I took, I followed it, and now recusals are pretty few and far between.

Chairman LEAHY. It's been a few years since you were in private practice.

Judge HAMILTON. Yes, sir.

Chairman LEAHY. But you could have one if you had——

Judge HAMILTON. There are family relationships.

Chairman LEAHY [continued]. Party to—financial.

Judge HAMILTON. My wife is a—my wife practices law, my brother-in-law practices law in the Federal courts within the Seventh Circuit, and obviously I would be recused from any case in which they were involved.

Chairman LEAHY. How many members are in the Seventh Circuit?

Judge HAMILTON. There are 11 active judge seats.

Chairman LEAHY. So it's not as though the court comes to a screeching halt if you recuse yourself.

Judge HAMILTON. No.

Chairman LEAHY. And would it be safe to say it's easy to err on the side of caution in those kind of things?

Judge HAMILTON. It is. I believe the Seventh Circuit also has a similar program in the Clerk's Office where specific parties or lawyers can be identified so a case involving those parties' lawyers will never be assigned to the judge in the first place.

Chairman LEAHY. Unlike the District Court where you're bound by the stare decisis not only of the Circuit, but in the U.S. Supreme Court you only have the Supreme Court for stare decisis. But also, of course, a Circuit Court can reverse their own decisions.

Would you agree with me that for a Circuit Court to change their own precedent would require a pretty significant situation or a pretty significant shift in the law throughout the country?

Judge HAMILTON. It would have to be pretty rare. I agree with that, Mr. Chairman. I can think of a couple of examples recently in which the Seventh Circuit has done so, where the Seventh Circuit had decided a particular issue under a relatively new statute

and no other circuits followed it. The Seventh Circuit, upon—when asked to reconsider those questions, has gone back and decided, all right, we'll come in line with everyone else.

Chairman LEAHY. But depending upon what the circumstances were, it would reflect—

Judge HAMILTON. Exactly.

Chairman LEAHY [continued]. This happening in the rest of the country.

Judge HAMILTON. That, or an intervening Supreme Court decision.

Chairman LEAHY. And of course if there is a Supreme Court decision on—it's very easy

Judge HAMILTON. It is.

Chairman LEAHY. Thank you.

Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much.

Welcome to all three of you. I can pronounce your name, Chief, having known you for a while. But Judge Hamilton—

Chairman LEAHY. That's going to be the new test.

[Laughter.]

Senator KLOBUCHAR. Those "K" names that are long are always difficult.

[Laughter.]

Thank you very much. I was just reading up—as I was listening to our colleague, to Senator Specter—just about, in fact, some of the background. When someone did look at your whole record as opposed to picking out a few cases that they may have disagreed with, I'm sure all of us would disagree with individual cases that a judge—decisions a judge made here and there.

But as Senator Specter pointed out, you presided over the closing of approximately 8,000 cases, which I think, at the very least, shows you're quite efficient. Of that number, you've presided over approximately 3,000 cases that went to verdict or judgment based on trial and/or decision you made, with roughly 1,150 written opinions.

The American Bar Association, which did an exhaustive examination of your credentials, your record, and your temperament, concluded that you deserve the highest rating of Well Qualified.

It's my understanding, in response to some of the issues raised with a case here or there, to get that rating the ABA must find the nominee to be at the top of the legal profession, have outstanding legal ability, breadth of experience, and the highest reputation for integrity, and demonstrate the capacity for sound judicial temperament.

So when the group that has done this exhaustive examination of your record gave you the highest rating unanimously, I just question—well, everyone has a right to question a judge's decisions here and there, and I'm glad that our colleagues appear to want to talk to you about these individually. I just think that that means a lot to me to read something like that.

But I just had one or two questions. One, was I know Chief Justice Roberts, at his confirmation hearing, talked about how he would like to see the Supreme Court make decisions and strive for consensus in decisions. Do you think that the U.S. Court of Appeals should be striving for consensus as well? You've gone from a District Court now to more of group decisionmaking.

Judge HAMILTON. I think that's one of the major changes that I

contemplate for moving from the District Court to the Circuit Court, if the Senate was to confirm my nomination.

I'm used to making decisions on my own, with help from staff and able law clerks, and so on, but they have to be my decisions.

At the same time, I have worked in a very collegial court in the Southern District of Indiana, with friends and colleagues. We don't select our colleagues; other people do that on the court.

Senator KLOBUCHAR. I know what that's like.

[Laughter.]

Chairman LEAHY. Very good.

[Laughter.]

Senator KLOBUCHAR. Continue on.

Judge HAMILTON. We don't always agree on everything but we work together well, we exchange our views, we make our decisions, and we move on. I know the members who are now on the Seventh Circuit and I would expect to be able to work with all of them on a similar kind of basis. I hope that I'll be able to.

Senator KLOBUCHAR. Very good. And I want to allow my colleagues here to ask a question or two.

One other question. You have been on the Federal bench for about 14 years, and as Chief Judge of the Southern District of Indiana since 2008, what are the challenges that you see for the Federal bench? I'm new on the Judiciary Committee and I'm looking forward to working with all of our judges on what are the challenges you see ahead.

Judge HAMILTON. Given my role, I should say first of all you should listen to whatever the Judicial Conference says—those are my bosses—on those sorts of issues. But from my perspective I would say to be cautious about the expansion of Federal jurisdiction, both criminal and civil.

We have plenty of work to do. I hope that Congress will maintain the distinct characteristics of Federal jurisdiction so that Federal courts can continue to play the special role that they do in our society. I hope that the Congress will continue to provide the adequate resources to the Judiciary as a whole. I know that's other committees besides this one's business, but that's going to be important.

I have to also, I think, say something about dealing with long-term criminal justice issues and working to develop effective punishment for the serious crimes that will protect the public, prevent further crime, and also manage that very difficult problem at reasonable public expense. Those would be my highlights, but as I say, I'd better defer to my bosses on any such administrative matters, the Judicial Conference.

Senator KLOBUCHAR. Thank you very much.

Judge HAMILTON. Thank you, Senator Klobuchar.

Chairman LEAHY. Senator Kaufman, before we go to you, I know the votes are just about to start.

Thank you.

Senator Kaufman.

Senator KAUFMAN. Yes. Judge, I am very impressed with your credentials and your experience and I think we're a really fortunate country. The country is fortunate to have you willing to take on this additional responsibility.

For 14 years you've been on the District Court. How is that experience,

do you think, going to affect your role when you're going to be judging appeals from your present colleagues?

Judge HAMILTON. I think that my work on the District judge—as a District judge has given me greater hands-on insight to what goes on in District Courts, to the kinds of decisions that have to be left to the sound discretion of the District judge who's managing a docket, managing a trial, as well as to those legal issues that the Court of Appeals has to decide uniformly for the entire Circuit. I hope it has helped me prepare to know how to read a transcript, the proverbial “cold transcript” that an appellate court must review, and to know the different kinds of tones and scenes that the same whole transcript can actually describe. I certainly have seen my cases go up on appeal. Sometimes they don't always look the same on appeal as they look to me at the District Court level, and I hope I can appreciate that difference with my colleagues whom I respect so much on the District Courts within the Seventh Circuit.

Senator KAUFMAN. You know, I'm impressed by the breadth of the support that you've received across the whole political spectrum. Can you talk a little about the relationship between your kind of personal opinions, political opinions as opposed to your opinions as a judge? I know you've had a lot of experience with that. Could you talk about that?

Judge HAMILTON. As a judge, you put your personal opinions aside. They really don't have any place in making those decisions. The decisions that I have to make are based upon the Constitution and the laws of the United States. They're based upon the interpretations of those provisions and statutes by the Supreme Court of the United States and the Seventh Circuit, taking advice also from other circuits, other Federal judges and State courts dealing with the same issues. But it's not a—the Federal judiciary is not a place for anyone to exercise their personal opinions.

Senator KAUFMAN. Thank you. I think you've made pretty clear where you stand on that.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Chairman LEAHY. Senator Whitehouse just came in. Also, a vote has started.

Senator WHITEHOUSE. Well, it just started at 3:27.

Chairman LEAHY. I'm going to go vote. Please continue and I'll be right back.

Senator KLOBUCHAR. This is my party now.

[Laughter.]

Unfortunately, half the people didn't come, but that's Okay.

[Laughter.]

Senator WHITEHOUSE. Thank you. I just have two questions. The first is for Judge Hamilton. Welcome, Your Honor.

Judge HAMILTON. Thank you, Senator.

Senator WHITEHOUSE. As I understand it, you were appointed to the U.S. District Court in 1994?

Judge HAMILTON. Yes.

Senator WHITEHOUSE. You went through a full FBI field background check at the time?

Judge HAMILTON. I did.

Senator WHITEHOUSE. You were confirmed by the Senate?

Judge HAMILTON. Yes.

Senator WHITEHOUSE. Everybody had adequate time, if they wished, to review your past until 1994 at that point?

Judge HAMILTON. I suppose so.

Senator WHITEHOUSE. One would suppose so, wouldn't one? For 14 years you've led a relatively public life as a member of the U.S. District Court and as the Chief Judge of that court. Is that correct?

Judge HAMILTON. I say the work I've done is public, my life is private, some would say monastic. But, yes.

Senator WHITEHOUSE. Given the fact that you've been cleared once already, the fact that your work is a matter of public record, the fact that you're in a very public position as the Chief Judge of the U.S. District Court in your district, can you hazard a guess as to what of concern might not be available to our friends on the other side that has caused them to fail to appear for this hearing?

Judge HAMILTON. Senator——

Senator WHITEHOUSE. You're a pretty open book. All you have to do is read it, right?

Judge HAMILTON. Senator, I'm glad to be here and my record is open. I appreciate the opportunity to appear before the Committee.

Senator WHITEHOUSE. I appreciate it. Thank you very much, Your Honor.

Judge HAMILTON. Thank you, Senator Kaufman.

Senator KLOBUCHAR. I had memorized all your key cases, Judge Hamilton, last night for my moment when Chairman Leahy was going to leave, but there was no one to tango with.

[Laughter.]

Chairman LEAHY. I haven't memorized anything.

Senator SCHUMER.

Senator SCHUMER. Mr. Chairman, you don't have to memorize anything, you're the Chairman.

[Laughter.]

Chairman LEAHY. Very recent rumors——

Senator SCHUMER. Anyway, first, I want to thank you for holding this hearing, Mr. Chairman.

Judge Hamilton, your record on the bench speaks for itself. I look forward to seeing you continue that success on the Seventh Circuit.

Mr. Chairman, thank you. And I thank all three of our nominees here and I think they're a great group.

Chairman LEAHY. Thank you.

Judge HAMILTON. Thank you.

Chairman LEAHY. Judge Hamilton, I know when Senator Specter was here he mentioned some of your cases. He did say he didn't necessarily disagree. But one was *Dole v. Prosecutor, Marion County and Henrichs v. Bozeman*, and *Women's Clinic v. Neiman*. Do you have any of the cases that have been mentioned here that you want to say anything about?

Judge HAMILTON. Thank you, Mr. Chairman. I appreciate the opportunity to address those concerns. The cases are all very familiar, too. I could probably talk about them a long time, but I'll try to be relatively brief.

First, let me say with respect to the case of *Dole v. Prosecutor*, I believe that there may be some misimpressions about that decision.

Indiana has a statute that requires sex and violent offenders to register periodically with law enforcement where they live, and work, and go to school.

In 2008, the Indiana legislature tightened some of those requirements. It added, for example, requirements that sex and violent offenders register with the State e-mail addresses and user names that they use in chat rooms. There has been no controversy about those provisions or the original sex offender registration provisions at all. None of those provisions were part of that case.

The one provision that was at issue in that case was a new requirement requiring sex offenders and violent offenders who had already completed all aspects of their criminal justice sentences, not only their prison sentences but also court supervision in the form of probation, parole, or supervised release, to consent to search of their computers and homes at any time without a warrant, without any individualized suspicion.

In a fairly lengthy opinion I explained why I thought, as applied to those offenders who had already completed their full sentences and who were no longer under supervision, a requirement that they be vulnerable to searches of their homes and computers at any time, without a warrant, is contrary to the Fourth Amendment.

There was no appeal, I should add, from that decision. The State of Indiana has accepted that decision. There was no appeal.

If I could speak briefly about the case of *Bozeman v. Henrichs*, I did not hold that legislative prayer was unconstitutional. What I held was that, on the facts presented to me, systematically and pervasively, sectarian prayers from the official podium of the House of Representatives did violate the establishment clause. What I did, was apply the principles that the Supreme Court had embraced in a case called *March v. Chambers*, the Supreme Court's venture into the issue of legislative prayer.

My decision on the merits was consistent with other appellate courts, both in the Federal and State court systems that have dealt with similar practices of persistently sectarian prayer in an official forum. I certainly hope that the decision is not interpreted at all as limiting anyone's free exercise of religion, nor is favoring any one religion over another. The whole idea of the establishment clause is that government stays neutral in matters of religion.

As Senator Specter pointed out, the decision was reversed ultimately on appeal on the issue of standing. The case came before me with several taxpayers objecting to the use of their tax money to support this practice. I applied the laws of taxpayer standing under the establishment clause as it existed at the time under then-controlling precedents the Supreme Court had——

Chairman LEAHY. This was before *Hine v. Freedom*.

Judge HAMILTON. Precisely. When the case first went to the Seventh Circuit, the Seventh Circuit, in an opinion written by Judge Ripple, whose retirement created the opening here, Judge Ripple and the panel wrote an opinion, saying, in essence, that I had decided the standing issue and the merits issues correctly and they

left my injunction in place pending the appeal.

While that appeal was pending, the Supreme Court decided the issue of *Hine v. Freedom From Religion Foundation*, which reshaped in ways that I think still remain to be worked out, the doctrine

of taxpayer standing under the establishment clause, and that panel divided 2:1 on how to apply Hine standing issue there. Chairman LEAHY. And you did not have Hine as stare decisis in any form at the time you made your decision?

Judge HAMILTON. I did not. I applied the controlling precedents in place at the time. With respect to the Newman decision, what I was doing was applying the principles adopted by the plurality opinion, the controlling plurality opinion in *Casey v. Southeastern Pennsylvania*. And I think it was clear that the *Casey* opinion left open the potential for a challenge to waiting period and informed consent laws after there was some experience with those laws. So there was an invitation, in essence, to parties who opposed such laws to develop that evidence and bring it before an appropriate court. I wound up being the court where that evidence was presented. I examined it carefully. I heard mention of the fact that the case took some time to decide. I would add that the case was brought in 1995.

I issued a preliminary injunction against enforcement of the statute in the fall of 1995. The State did not appeal that decision. Instead, the case was diverted to the State courts to resolve some issues of State law. When it came back to Federal court, I modified the preliminary injunction accordingly. There was, again, no appeal in the preliminary injunction. My recollection is that then the parties engaged in a fairly elaborate and lengthy process of discovery that involved complex statistical evidence.

Professors from several universities were brought in to examine the statistics. My recollection is that I scheduled the trial when the parties told me they were ready, after they had ample opportunity to study the experience in other States of similar laws. I held the trial, accepted additional evidence that the parties wanted to submit afterwards, as well as elaborate briefs, and decided, I think, with appropriate speed——

Chairman LEAHY. That was the parties on both sides? That was the parties on both sides?

Judge HAMILTON. It was. That's my recollection, Senator.

Chairman LEAHY. Well, do you have any other——

Senator SCHUMER. Yes. I just——no, I just wanted to make a comment, Mr. Chairman. I regret that our colleagues are not participating here. It doesn't bode well for moving and filling vacancies on the bench. You——when they were in the majority, Mr. Chairman, you led us. And we asked a lot of questions, we opposed certain nominees, but we never boycotted.

A first nominee who is supported by the Republican Senator from his home State, who is known from——you know, in jurisprudence as a moderate, supported by a member of the Federalist Society, I just find it——I just have to say it's just regrettable and I want to apologize to you, Judge Hamilton. The questions that you should be asked by some who might——maybe they don't have any difficult questions to ask you, or they think they can't get you on asking questions so they don't come. But I just find this——let's put it like this. I think they're off to a bad start.

Chairman LEAHY. Well, you know, I won't question anybody's motives. I am——statistics. I would note that when the Democrats were in charge we moved more of President Bush's nominees, faster,

than when the Republicans were in charge, to try and demonstrate that we wouldn't be partisan. I hope they're not going to be partisan on this.

We're not going to hold this hearing—it's going to be slightly over 3 weeks before we have a mark-up on this, so it'll be the first Thursday when we come back. I'll keep the record open until the end of this week. Any one of you can add to it, but you have to sit here. Certainly anybody can ask any questions. I've been here longer—in the Senate longer than any member of this Committee. We've had several long—ones but I've never known a time, whether somebody was for or against, that needed more than 3 weeks to get the answers to my questions.

We'll stand in recess. I congratulate you all, and I thank you all for being willing to answer your Nation's call in this way. Each one of you has answered the—call before and I appreciate you doing it again.

DAVID HAMILTON
WEDNESDAY, APRIL 29, 2009
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Benjamin L. Cardin, presiding.

Present: Senators Cardin, Feingold, Schumer, Durbin, Whitehouse, Kaufman, and Coburn.

OPENING STATEMENT OF HON. BENJAMIN L. CARDIN, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator CARDIN. The Senate Judiciary Committee will come to order. Let me welcome everyone here today. I particularly want to welcome our three nominees and their families and thank each of them for their public service and their continued desire to serve the public, and thank their families for the sacrifices that they make in order that their spouses can serve in public life.

I want to thank Chairman Leahy for allowing me to chair the hearing. It is my understanding that Senator Coburn will act as the Ranking Member at today's hearing and that he is on his way to the Committee and has told me through staff that we should get started. So in order to keep to the schedule, not too clear as to when the next votes will be on the floor of the Senate, we will start today's hearing.

I just want first, to Judge Hamilton, I hope you will allow me, with just a little bit of Maryland pride, talk about today's hearing. So I welcome David Hamilton, Judge Hamilton. I welcome Judge Andre Davis and Tom Perez, and I look forward to this hearing today and look forward to your service in the positions that you have been nominated to by President Obama.

Judge David Hamilton from Indiana, this is his second appearance before our Committee. He enjoyed himself so much last time, he decided he wanted to come back. I regret that you have to come back for a second hearing. At the first hearing, there were no Republican members to ask questions, and no Republican members proposed written questions. And at the request of the Republicans, we have scheduled a second day of hearings for Judge David Hamilton. His record has already been placed in our record, his experience and his resume. But let me just point out very briefly that it includes 14 years on the Federal district court, an ABA rating of well qualified. He is supported by both Indiana Senators, Senators Bayh and Lugar. And just quoting very quickly from what is in the record from Senator Lugar when he said, "I do not view our Federal courts as the forum for resolving political disputes. That is why I believe our confirmation decisions should not be based on partisan considerations, much less on how we hope or predict a given judicial nominee will vote on a particular issue of public moment or controversy. I have instead tried to evaluate judicial candidates on whether they have the requisite intelligence, experience, character, and temperament that America deserves from their judges and also on whether they indeed appreciate the vital, yet vitally limited role of the Federal judiciary faithful to interpret and

apply our laws rather than seeking to impose their own policy views. I support Judge Hamilton's nomination and do so enthusiastically because he is superbly qualified under both sets of criteria.''

I think that is quite a tribute by Senator Lugar, and it expressed the desires that we would like to see in all the nominees that we consider for the court.

Senator MIKULSKI. I really want to thank Senator Leahy for being so prompt in scheduling these hearings and also to allowing us to testify today.

And it is great seeing you in the chair. You look like you belong there.

Mr. Chairman, I also am sorry that Judge Hamilton has had to come back for a second hearing, and I note that there are no other people from the other party who are present at this hearing. I hope we will not face that same situation where people do not come and do not submit letters.

Senator SARBANES. But I do want to take a moment first to note with respect to Judge Hamilton that his uncle, his father's brother, was one of the most distinguished Members of the Congress of our generation, Congressman Lee Hamilton, who rendered such extraordinary service here in the Congress and continues to render extraordinary service as the head of the Woodrow Wilson Center. So there is a great Hamilton tradition in American public service, and I would be remiss not to note it at the outset.

Senator CARDIN. Senator Sarbanes, I want to thank you for being here and speaking in regards to these nominees. I know it is very helpful to our Committee, your observations, and we thank you for returning. And, Senator Mikulski, it is always nice to have you in our presence on the Judiciary Committee any time you want to.

Senator Coburn.

STATEMENT OF HON. TOM COBURN, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator COBURN. First of all, Senator Sarbanes, great to see you again. Thank you.

Senator SARBANES. Thank you, Tom.

Senator COBURN. Senator Mikulski, thank you both for your input. I understand that you are taking both the Ranking and the Chairmanship in my absence, and I apologize for being late. I also would apologize for other members of our Caucus. I think I had three hearings scheduled at 2 o'clock as well, so I would announce ahead of time I have another one at 3:00, so I will be leaving, and will be submitting a large number of questions for the record.

I appreciate your recommendations. They mean a lot. I think one of the things we do want to do is we want to make sure President Obama gets qualified judges and the ones he selects. That is his right. But I also think we ought to have the due diligence and the time to explore the areas that we might want to know. And so we will be expeditious but also thorough, and we will try to work with the majority to make sure that happens.

Thank you for your testimony.

Senator CARDIN. Thank you, Senator Coburn.

Thank you.

Senator SARBANES. Thank you.

Senator CARDIN. We will now invite the three nominees to come forward. And if Judge Davis and Judge Hamilton and Secretary

Perez will remain standing for one moment. Thank you. And if you would raise your right hand and repeat after me. Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth?

Judge HAMILTON. I do.

Senator CARDIN. Thank you. Please have a seat.

Judge Hamilton.

STATEMENT OF DAVID F. HAMILTON, NOMINEE TO BE
CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT

Judge HAMILTON. Thank you, Mr. Chairman. It is a pleasure to be here again to answer any questions the Committee may have. Not exactly the same group of people are here as those who were here on April 1st, but my wife, Inge Van der Cruyss, and my father, Dick Hamilton, are here. I feel I should also introduce next the two members of the contingent who have Baltimore connections under the circumstances.

Senator CARDIN. That might be helpful to you.

[Laughter.]

Judge HAMILTON. My cousin, Doug Schmidt, and my long-time friend, Judge Jim Bredar, who is a magistrate judge in the District of Maryland; also Bill Schmidt, my uncle; his wife, Casiana Schmidt; Sarah Schmidt; my cousin, Tracy Souza; my long-time staff members, Jenny McGinnis and Chuck Bruess; law clerks Alison Chestovich, Allison Brown, Jordana Rubel, Jim Trilling, and Kathleen DeLaney; and a long-time friend, Bill Moreau, are all here today.

Senator CARDIN. Thank you.

Let me again thank all three of you for being here. We are going to use 10-minute rounds because of the importance of the positions that we are considering today. I promise that I will be briefer than 10 minutes in my first round so that Senator Coburn will have the full time available for the other commitment that he has.

I do have other questions, but I am going to wait until the second round, and I will call on Senator Coburn.

Senator COBURN. Thank you.

Judge Hamilton, thank you for coming back. I am sorry we have not been able to meet or discuss in person. I hope to get that accomplished. I am going to jump around a little bit, and then I have a series of about 20 questions for each of you that I will be submitting for the record.

All right. Judge Hamilton, do you have any comments on that in terms of the utilization of international law? You need to turn your microphone on, if you would. It is OK. I forget all the time.

Judge HAMILTON. I forgot again. In my courtroom, it is always on.

Senator COBURN. Well, that can be dangerous at times.

[Laughter.]

Judge HAMILTON. Well, I will not tell those stories if I can avoid doing that.

I think, first of all, it is clear to all American judges that I know that when we are applying the American Constitution and interpreting it, it is the United States Constitution that we are interpreting.

I do not have any misunderstanding about that myself. I do not believe anyone else does.

There are situations that we have seen in which the Supreme Court or other courts, in struggling with a difficult question, will look to guidance from wise commentators from many places—professors from law schools, experts in a particular field who have written about it. And in recent years, the Supreme Court has started to look to some courts from other countries where some members of the Court may believe that there is some wisdom to be gained.

As long as it is confined to something similar to citing law professors' articles, I do not have a problem with that. But I think all of us remember that the Constitution, after all, is the product of a rebellion against a foreign power, and it is an American document that we are interpreting and applying.

Senator COBURN. OK. So outside of scholarly pursuit, the guidance will be the Constitution and the statutes.

Judge HAMILTON. That is my view, yes.

Senator COBURN. Thank you.

In a speech in 2003, you quoted another judge who once said that part of a judge's job is to write a series of footnotes to the Constitution. You added to that that they do that every year in cases large and small. Would you kind of explain that to me, your meaning behind the statement?

Judge HAMILTON. Certainly. The speech you are referring to was in honor of my late colleague, S. Hugh Dillin, whose seat I was nominated to take back in 1994. And to give you an idea, I attended schools as a boy that Judge Dillin had desegregated, and he drew great criticism for doing that back in the 1960s. The way he described our work is the daily or weekly application of the provisions and principles of our Constitution to new cases and new situations as they arise. And at least to me, the concept of the footnote implies what we are trying to do is not something new, but work out the details of how those principles apply to new situations.

Senator COBURN. All right. Thank you very much. I would say Lee Hamilton is one of my heroes. I have great admiration and respect for him. I served with him for 6 years in the House, and he is a stellar individual.

I will submit questions to all three nominees, and I would ask for certain that the record be left open because the other members of our Caucus would like to do that as well.

Senator CARDIN. And it will be. The record will be left open for questions, and we would urge the nominees to try to answer those questions as promptly as possible so that the Committee can consider the nominations in a timely way. So the record will remain open.

Senator KAUFMAN. How are you going to see your role as different on the circuit court of appeals as opposed to the district court?

Judge HAMILTON. Thank you, Senator Kaufman. Like Judge Davis, I will miss trial work if I am confirmed for this position and will miss the opportunity to work on a daily basis with juries and with lawyers in trials and conferences. I look forward to the possibility, though, of engaging in some of the legal issues in more detail,

perhaps with a little more time to engage in them on those matters that are left less to the discretion of the individual trial court and more to broader rules of law that will be applicable to the whole circuit.

Senator KAUFMAN. I just want to thank all three of you for agreeing to come and help us deal with the problems in the Federal Government, and I think it is really a tribute to the country that you are willing to do this, and I just want to thank you for it.

Thank you, Mr. Chairman.

Judge HAMILTON. Thank you, Senator.

Senator CARDIN. Senator Feingold is here, so before I start my second round, I will give Senator Feingold an opportunity.

Senator FEINGOLD. Thank you very much, Mr. Chairman. Welcome to all the witnesses and congratulations on your nominations.

Senator CARDIN. Thank you, Senator Feingold.

If I might, to both Judge Davis and Judge Hamilton, Secretary Perez's work in pro bono is well known.

I know from each of your records that you have been involved in pro bono, so I know that. My question to you is that, as an individual, as an attorney, as a judge, and, if confirmed, as an appellate court judge, how do you see your role in advancing equal opportunity before our courts, particularly those who do not have the resources to have the opportunities that others have in getting access to our judicial system?

Judge HAMILTON. Senator, when I talk with new lawyers or law students, I try to encourage in every instance them to commit a substantial amount of their time to pro bono work. That was something that was critical for me in my development as a new lawyer.

I try to suggest it is not only the right thing to do for the profession and for the clients they serve, but there is also a self-interest in doing so. It is a way for a young or a new lawyer to invest in his or her career in developing skills, having opportunities to serve clients in ways that they might not be able to with their paying work that brings them along. I know that was critical for me in my development as a lawyer.

Like the District of Maryland, we also have programs in place to assist pro se litigants. I have to say also at the same time, some of the pro se litigation obviously is frivolous. It winds up taking a good deal of time from the court. But it is also an important part of our work to deal with all of those claims fairly and as expeditiously as we can.

We provide, for example, panels of lawyers who are available to be contacted by pro se litigants who would like help with their cases. We have to do that under Seventh Circuit case law, which governs how we go about the business of recruiting counsel, when we must, when we should recruit counsel for pro se litigants. So consistent with the Seventh Circuit law on the subject, we do what we can along those lines.

I also would just say briefly that I think that in my work both as a judge and as chief judge with some administrative responsibilities, I have certainly tried to make sure that in our administrative roles, in hiring new personnel and so on, that we are as much an equal opportunity employer, supervisor, and dispute resolver as we can be.

Senator CARDIN. Thank you.

I want to ask a question that Chairman Leahy always asks those who are seeking to become judges, and that is, can you share with us a moment during your career where you stood up for something that was not popular, stood up for people who were disadvantaged, whether it was against Government or big companies, that indicated your willingness to step forward in order to protect the rights of individuals?

Judge HAMILTON. Well, as some members of the Committee may be aware, a few of my cases have generated a fair amount of criticism and they have not been popular. When I worked in private practice, I would say a lot of the pro bono work that I did fits that description. I can think of, for example, a couple of cases back in the mid-1980s as America was dealing with the first waves of the AIDS epidemic, and there was a lot of fear, there was a lot of discrimination against people who tested positive.

I assisted a man, for example, a father who had been stripped of his rights as a parent because he had tested positive for the HIV virus. A State court had terminated his right as a parent of his son. I assisted in the appeal that led to the restoration of those rights.

I assisted a young boy named Ryan White, who became well known, when he was told he could not attend school after he had gained the HIV virus through a transfusion. He was a hemophiliac. He later passed away, but he was a courageous story and an inspiration to everybody who dealt with him.

Just about every other pro bono case that I handled dealt with, in essence, the less powerful or less monied against more powerful and wealthier interests, whether it was archaeological interests against coal mining interests or opposing the State government in trying to destroy a historic building.

And as I said, I think in my work as a district judge, I try not to go out of my way to be unpopular. That is just not the way we decide cases. Sometimes the right result turns out to be the popular result. Sometimes the right result is unpopular. You just go with the right result.

Senator CARDIN. Well, I thank you. That is a very meaningful response, and we all do know about those causes. So you made a huge difference. All of you have made huge differences in that regard, and we thank you for that.

The record of the Committee will remain open—let me get my formal notices here. The hearing record will remain open for 1 week for additional statements and questions from Senators.

Again, we ask the witnesses to respond promptly to the questions that are asked by members of the Committee. Without objection, Chairman Leahy's statement will be made a part of the record.

I want to once again thank our nominees not only for being here and their responses to the questions that were asked, but their continued service in the public. All three of you have made incredible contributions and are going to continue to do that, and it is a pleasure to have you before our Committee. Thank you very much.

Judge HAMILTON. Thank you, Senator.

Senator CARDIN. The hearing is adjourned.

STEPHEN HIGGINSON
WEDNESDAY, JUNE 8, 2011

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Committee met, pursuant to notice, at 2:33 p.m., Room 226,
Dirksen Senate Office Building, Senator Al Franken, presiding.

Present: Senators Schumer and Grassley.

OPENING STATEMENT OF HON. AL FRANKEN, A U.S. SENATOR
FROM THE STATE OF MINNESOTA

Senator FRANKEN. This hearing is called to order.

Before we begin, I'd like to welcome all of you here today to the
Senate Judiciary Committee. While the entire Senate must provide
their advice and consent to the President on nominations, the Judiciary
Committee is uniquely charged with the important duty of
evaluating the President's judicial nominees prior to their confirmation
by the full Senate.

We are honored today to have these accomplished nominees here
with us and look forward to hearing from them.

Today we will consider five nominations: Steven A. Higginson,
for U.S. Circuit Judge for the Fifth Circuit; Judge Jane M. Triche-
Milazzo, for U.S. District Judge for the Eastern District of Louisiana;
Alison J. Nathan, for District Judge for the Southern District
of New York; Katherine B. Forrest, for District Judge for the
Southern District of New York; Judge Susan O. Hickey, for District
Judge for the Western District of Arkansas.

We are fortunate to have some of these nominees home State
Senators and Representatives here to introduce them, so we will
turn to them shortly. But before we do, I'll turn the floor over to
my good friend, the Ranking Member, Senator Grassley, for his
opening remarks.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR
FROM THE STATE OF IOWA

Senator GRASSLEY. Thank you, Mr. Chairman. I welcome our
nominees, as my Chairman has done, and of course, family and
friends who are proud of everybody that's been nominated.

Nomination hearings are important events not only for the nominee
and for the family, but also for this institution and for the public.

The advice and consent function of the Senate is a critical step
in the process. This hearing, and other hearings, give Senators further
information to consider as we contemplate whether or not to
give that consent.

In Federalist Papers 76, Alexander Hamilton wrote, "To what
purpose then require the cooperation of the Senate? I answer, that
the necessity of their concurrence would have a powerful, though,
in general, a silent operation. It would be an excellent check upon
the spirit of favoritism in the President, and would tend greatly to
prevent the appointment of unfit characters from State prejudice,
from family connection, from personal attachment, or from a view
to popularity."

In other words, the Senate has a role in preventing the appointment
of judges, or simply political favorites of the President, or of
those who are not qualified to serve as Federal judges.

So I would remind my colleagues of what then-Senator Obama stated about this duty. Six years ago today, June 8, 2005, in connection with the attempted filibuster of Janice Rogers Brown, he stated: This is Senator Obama: “Now the test for a qualified judicial nominee is not simply whether they are intelligent. Some of us who attended law school or were in business know there are a lot of real smart people out there whom you would not put in charge of stuff. The test of whether a judge is qualified to be a judge is not their intelligence, it is their judgment.”

A few months later, on January 26, 2006 when debating the Alito nomination, then-Senator Obama stated: “There are some who believe that the President, having won the election, should have the complete authority to appoint his nominee, and the Senate should only examine whether or not the Justice is intellectually capable and an all-around nice guy. That once you get beyond intellect and personal character, there should be no further question whether a judge should be confirmed.”

Senator Obama continued, “I disagree with this view. I believe firmly that the Constitution calls for the Senate to advise and consent. I believe that it calls for meaningful advice and consent that includes an examination of a judge’s philosophy, ideology, and record.”

So, Mr. Chairman, our inquiry of the qualifications of nominees must be more than intelligence, a pleasant personality, or a prestigious clerkship. At the beginning of this Congress, I articulated my standards for judicial nominees. I want to ensure that the men and women who are appointed to a lifetime position in the Federal judiciary are qualified to serve. Factors I consider important include intellectual ability, respect for the Constitution, fidelity to the law, personal integrity, appropriate judicial temperament, and professional competence.

In applying these standards, I have demonstrated good faith in ensuring fair consideration of judicial nominees. I have worked with the Majority to confirm consensus nominees. However, as I have stated more than once, the Senate must not place quantity confirmed over quality confirmed. These lifetime appointments are too important to the Federal judiciary and the American people to simply rubber-stamp them.

I am becoming increasingly concerned about some of the judicial nominations being sent to the Senate. In a few individual cases it’s very troublesome. Perhaps the White House has grown tired of my observation that, for most of this President’s term, a majority of vacancies had no pending nominee. But in their rush to remedy that situation, I would hope that they would not send up nominees who lack appropriate experience or who otherwise fail to meet the standards I previously mentioned.

I am sure it is no surprise to you, but I have a longer statement I am going to put in the record.

Senator FRANKEN. That will be included in the record. I thank the Ranking Member, who is very intelligent and all-around nice guy.

Senator GRASSLEY. Well, thank you.

[Laughter.]

[The prepared statement of Senator Grassley appears as a submission

for the record.]

Senator FRANKEN. Now I'd like to recognize my distinguished colleague, also very intelligent and very all-around—I'm not going to—you know I'm going to recognize a lot of Senators, so I'm going to stop this because Senator Landrieu and Senator Vitter are here, all very nice people.

[Laughter.]

Senator GRASSLEY. So far he's been very bipartisan.

[Laughter.]

Senator FRANKEN. And bi-gender, too.

[Laughter.]

Senator FRANKEN. Thanks for pointing that out. OK.

Now to Senator Landrieu and Senator Vitter, who will introduce Professor Higginson and Judge Triche-Milazzo.

PRESENTATION OF STEPHEN A. HIGGINSON NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE FIFTH CIRCUIT AND JANE M. TRICHE-MILAZZO NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF LOUISIANA BY HON. MARY LANDRIEU, A U.S. SENATOR FROM THE STATE OF LOUISIANA

Senator LANDRIEU. Thank you, Mr. Chairman. I really appreciate the opportunity to present such outstanding candidates to you and to the Committee for your consideration today.

I'm going to start by saying I'm going to have to slip out right afterwards, as I'm chairing a hearing in just a few minutes right down the hall.

Senator FRANKEN. And the same for every Senator. I know you've got plenty to do.

Senator LANDRIEU. Thank you so much.

Senator FRANKEN. And I want to thank all Senators who are here to introduce the nominees.

Senator LANDRIEU. Thank you so much.

Let me begin by presenting Mr. Steven Higginson, who is before you today for a nominee—as a nominee to the Fifth Circuit Court of Appeals. Before I begin going into, just briefly, his academic credentials, which are extraordinary, let me say that he's surrounded by a very proud family, including his parents, Charles and Genevra Higginson; his brothers, Timothy and Philip; his children, Christopher, Cadie and Noelle; and his wife, Collete Creppell.

I'm very happy, Mr. Chairman, and I think you and the Ranking Member will be very pleased to hear, that this is not the only special occasion of this family, as extraordinary as it is today. His two girls, two of his three children, have just returned from Germany where they played, and won, the World Championship for the U.S. of A on the Girls U-15 Women's Soccer Club. So can we all give them a hand, please?

[Applause].

Senator LANDRIEU. Their Louisiana teammates represented our United States very well on the field. Their father will represent our country and the constituents that we seek to serve each and every day beautifully on this bench, should your Committee and the Senate approve his nomination.

I'll have to be honest, Mr. Chairman. When I began my search for someone that could replace Judge Jacques Wiener on the Fifth Circuit, who was an outstanding judge, I was not familiar with Mr.

Higginson personally. But as my Committee met and reviewed a list of potential nominees that could serve on this very important and historic bench, his academic record and his achievements literally just jumped off the pages to me as I was reviewing them in some detail.

Let me just hit the highlights. He earned his first degree from Harvard summa cum laude. After graduating, he earned a Master's in Philosophy from Cambridge as a Harvard Scholar. With degrees from two of the most prestigious institutions on the planet, he then decided to pursue a J.D. from Yale Law School.

When he graduated 3 years later, Steven had earned the extraordinary distinction of being both editor-in-chief of the Yale Law Review and the winner of the Israel H. Perez prize for Best-Written Contribution to the Law Review.

After graduating from Yale Law School, he served as clerk to Hon. Patricia M. Wald, who is with us today, from the U.S. Court of Appeals for the District of Columbia and we are honored to have Honorable Patricia Wald with us today.

He then went on to serve as law clerk to Brian White on the U.S. Supreme Court, Justice Brian White. Since 1993, he's resided in New Orleans, initially serving as Assistant U.S. Attorney for the Eastern District, doing an outstanding job.

Mr. Chairman, after only 2 years in that office he became Chief of Appeals. As Chief of Appeals, he personally handled and supervised all criminal and civil appeals in the District, editing or writing more than 100 appellate briefs and presenting numerous oral arguments before the Fifth Circuit Court of Appeals, a court he is now being nominated to serve.

Very briefly and in conclusion, he has, in addition to all of this, become a full-time Associate Professor of Law at Loyola University, and earned the honor of Professor of the Year for each of the 3 years of teaching at Loyola. I don't believe I could have found, if I had looked, anyone more qualified. He is a tremendous intellectual asset, great father, great member of our community, and his character is quite apparent in the achievements represented here. I will submit the rest for the record.

[The prepared statement of Senator Landrieu appears as a submission for the record.]

PRESENTATION OF STEPHEN A. HIGGINSON NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE FIFTH CIRCUIT AND JANE M. TRICHE-MILAZZO NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF LOUISIANA BY HON. DAVID VITTER, A U.S. SENATOR FROM THE STATE OF LOUISIANA
Senator VITTER. Thank you very much, Mr. Chairman, Ranking Member Grassley. You know, when I was listening to the Ranking Member's comments quoting the Federalist Papers, it just struck me, and I hope we all pause occasionally and are properly thrilled and honored about our personal role in things that the Constitution put in place and that the Federalist Papers were about. Maybe we're so busy we don't do that often enough, but it struck me at that moment. I'm personally honored and thrilled to be a small part of this process. I know our nominees and their families feel that way, particularly today.

And I think Senator Landrieu and I, being so united and so enthusiastic—

and we are—about our two Louisiana nominees, is a great example of how it's supposed to work, as cited in the Federalist Papers and how it has worked in practice in this case, and that's a great thing. And so I certainly join Mary in being extremely, not just supportive, but enthusiastic about our nominees.

Steven Higginson. Mary outlined most of his background. He has unbelievable academic and intellectual credentials that are unquestioned. He also has served as an Assistant U.S. Attorney, particularly focusing on appeals. In that role he has gotten high, high praise from every part of the Bar, every part of the bench. He's just won the respect of everyone in the community based on his work ethic, and his honesty, and his integrity, and his dedication to the job.

In that, he has authored over 100 Federal appellate briefs. He's reviewed more than 300 additional Federal appellate briefs. Obviously his academic background, his clerkship with Justice White, other parts of his background, have served him exceedingly well in that regard.

Because of that he also won the Excellence in Law Enforcement award from the New Orleans Metropolitan Crime Commission, and a lot of that has to do with, he was very involved, and a leader, on many of our most important and most difficult recent public corruption cases.

I can tell you, being a Louisiana citizen, his and others' work on those public corruption cases has been an enormous public service that we're all grateful for. So I'm really, really excited to join with Mary in wholeheartedly supporting this nomination.

So I'm delighted to join with Mary in strongly endorsing both of these nominees, and thank you all for having this hearing that includes them both.

Senator FRANKEN. Thank you very much, Senator Vitter.

Senator FRANKEN. OK. Now we will begin our first panel. Professor Higginson, will you take your seat? Well, actually, why don't you not—just stand and raise your right hand. There you go.

[Whereupon, the nominee was duly sworn.]

Senator FRANKEN. Thank you.

Now, is your daughter the soccer player here?

Professor HIGGINSON. Yes. My twin daughters are. They're both here.

Senator FRANKEN. Yes. OK. You can stay seated, or you can stand doing this. I just want to give you—feel free to introduce your family however you want, standing or sitting.

[Laughter.]

STATEMENT OF STEPHEN HIGGINSON, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE FIFTH CIRCUIT

Professor HIGGINSON. I'd like to first thank the Senate, Chairman and Ranking Member, for allowing me to appear before the Senate and this Committee. That's a great honor and I'm grateful. I'd also like to thank Senator Landrieu for recommending me to the President, and the President for nominating me, and thank Senator Vitter for his support and his kind words today.

Additionally today, thank you, I'm joined by my family. My parents are here, my mother and father in the front row.

Senator FRANKEN. Hi. Welcome.

Professor HIGGINSON. They're not the soccer players.

[Laughter.]

Senator FRANKEN. Oh. They're the grandparents of.

Professor HIGGINSON. The grandparents of the soccer players.

Senator FRANKEN. Yes.

Professor HIGGINSON. The two soccer players, daughters, twins, are Cadie and Noelle here.

Senator FRANKEN. And this is a full team? It's not two people soccer?

[Laughter.]

Professor HIGGINSON. It's a full team.

Senator FRANKEN. Other people won it too, right? Congratulations.

Thank you for winning on our behalf.

[Laughter.]

Professor HIGGINSON. And my son Christopher is also a player.

I'm very proud of all my children. He's there.

Senator FRANKEN. How are you doing?

Professor HIGGINSON. And my two brothers, Timothy and Phil, have come from Chicago and North Carolina. And also seated here is Judge Patricia Wald, who was my first judicial employer and role model.

I'd like to also thank quite a few friends who have traveled from out of State here.

Senator FRANKEN. OK. Well, welcome to all of you. Again, congratulations to the twins for representing our country so well in Germany.

And Professor Higginson, you have—as you were being introduced, I was—that was—that's a pretty stunning resume there, I must say. And—and also a very bipartisan—did you see that, how bipartisan that was, and how enthusiastic they were? That will make you happy, right?

[Laughter.]

Senator GRASSLEY. Well, you make the Senate look good, too.

Senator FRANKEN. Yes. Yes. Well, I'm saying they do. OK.

You have spent the majority of your career as a Federal prosecutor, dealing with issues from FDA enforcement against criminal drug manufacturers, to accountability for political corruption. You have received some of the Department of Justice's highest awards for your work in this field.

If you are confirmed, how will your perspective on cases change?

Professor HIGGINSON. My perspective on cases, I think, would in some ways be the same, and in other ways different. To elaborate, as an advocate and having had the opportunity to be in the courtroom for 20 years, I feel that I do know the rules and the importance of professional courtesy and the importance of the adversarial process.

Specifically, having been a public servant for the Department of Justice and representing the people of the United States, I do understand that my duty has always been to faithfully apply and take care that laws are executed. Additionally, that the duty of a Federal prosecutor or public servant is to see that justice is done. I think those qualities will transfer well.

On the other hand, of course, a judge has to be impartial, is not a specific advocate. I think the last 15 years of my appellate work

specifically might be of assistance to the Fifth Circuit because I'm very familiar with the procedures there and the rules, and I've been in front of that court and I revere it greatly.

Senator FRANKEN. Now, you're a professor. You talked about applying the law, right? And I know you talk to your students about that. So let's talk about applying the law. What extent do you think that life experience enters into that? I know that it's, in theory, you know, not supposed to, but then again it does, I would think.

Right? Am I—discuss—

Professor HIGGINSON. Well, Senator, I think—I discuss—

[Laughter.]

Professor HIGGINSON. Life experiences and personal viewpoints stop at the courtroom door. There is no room for them in the role of the judge at all. Now, that said, I do think there are temperamental qualities of a judge that are important. Everybody who walks into a court—I certainly know this having been an attorney—every litigant, every party wants to feel welcome when they walk into a court in the United States.

I also think it's very important for Federal judges at any level to remain humble, to realize that they serve the people and therefore not to be arrogant, because the indispensable quality of a judge is to be open-minded, to consider the law fully, to apply the facts, but exclusively that.

So in terms of life experiences, those have no role in the decisionmaking of a judge. But I do think that they are important in terms of respecting litigants and opposing views and not pre-judging anything until the parties all feel they've heard. I know, having lost cases, that the most important quality and wonderful quality of our system of justice is that you know you've been heard.

Senator FRANKEN. OK. Well, thank you, Professor Higginson.

You just seem unbelievably qualified and I—and your Senators seem to be quite enthusiastic about your nomination. In fact, they said so many times.

[Laughter.]

Senator GRASSLEY. Are you going to swear him in?

Senator FRANKEN. I swore him in.

Senator GRASSLEY. Oh, you did that?

Senator FRANKEN. Yes.

Senator GRASSLEY. How did I miss that? I wasn't sleeping, I'm sure.

Senator FRANKEN. No. I think you were reading something important. I swore you in.

Professor HIGGINSON. Yes, you did.

Senator FRANKEN. Yes, I did. OK.

[Laughter.]

Senator GRASSLEY. I saw him stand up, but you made him sit down right away.

Senator FRANKEN. Well, that's what confused you.

Senator GRASSLEY. OK.

Senator FRANKEN. Thank you. We'll go the Ranking Member.

Senator GRASSLEY. In answer to his question, you seem to be a pretty good person that I think I'd want on the bench, and I don't know much about you yet. But at least I liked that last answer you gave about leaving personal feelings at the courtroom door.

As I'm sure you're well aware, there are currently several constitutional challenges to the Congress' authority under the Commerce Clause to mandate everyone purchase health insurance as required under the Patient Protection and Affordable Care Act. As a Professor of constitutional law—and I'm looking at you in that position right now where you are—I'm interested in learning more about your understanding of Congress' authority under the Commerce Clause and its potential application to an individual mandate. Several commentators, including Professor Goodwin Liu, have said that Lopez and Morrison are difficult or incoherent standards in outlining the limitations of the Interstate Commerce Clause. How would you describe the limitations on Congress' power under the Commerce Clause?

Before you answer that, I'd like to say that most people that come here to answer our questions would say something like this in answer to that question: "if confirmed, I'll follow the law and the precedents." That's not really an answer because you're a constitutional law professor and understand the Commerce Clause better than this farmer does, because I'm not a lawyer. And so I'd like to have you answer it from the standpoint as, if I'm one of the students in your class. How far does the Commerce Clause go?

Professor HIGGINSON. Senator Grassley, thank you for that question. All Congress' powers are few and defined, and that includes the enumerated powers which also includes the Commerce Clause. The Commerce Clause has been the basis for many Federal criminal statutes that I've had to enforce, so I'm acutely aware of the limits of the authority of Congress to regulate or prescribe activities. So being specific, for example, in my practice, arson, Hobbs Act, many crimes we pursue we have to be very sensitive to the limits of Congressional authority. Now, as a judge, separately, I would be very mindful of the fact that Congress makes the law. Judges don't make the law, judges interpret the law.

If Congress exceeds its authority, however, it is the job of the judge to declare an act that is repugnant to the Constitution void. Specifically turning to your Commerce Clause question, it would be important—if I were teaching my students, I would—I would teach at a level of generality that would not face me if I were a judge. If I were a judge, it would be imperative for me to know the facts and to apply controlling law to those facts, with the benefit of the judicial process. And I want to emphasize that. Whenever I walk into a court I try never to say or write anything that I can't support with a citation to the record or to a citation of controlling or persuasive authority. It is not a judge's responsibility to do anything other than that.

But you've asked me to elaborate my views as a teacher, and the cases you described do cover the terrain of the Commerce Clause scope. Morrison and Lopez were limitations on Congressional authority. After that, there was another case, the medical marijuana case out of California, Rake, which defined further the scope of the Commerce Clause without trying to describe what an outcome might be as to cases that are presently pending in courts and that will work their way to the Supreme Court, which then, if I'm confirmed, I'd be an intermediate court, obligated to follow that law. I will say that Congress' authority to regulate activity is limited to

regulating three types of activity. This is spelled out in the cases you described: instrumentalities of commerce, channels of commerce, and activities that substantially affect interstate commerce.

In that context, the question you asked, I would have to define to my students more, well, what is the activity being looked at? Is it economic in nature? Is it purely interstate, in which case Congress and the Tenth Amendment might have fewer powers? So it takes me about 2 weeks, in my constitutional law class, to elaborate an answer to that question. But I hope that gives you some insight.

Senator GRASSLEY. Don't take 2 weeks this time.

Professor HIGGINSON. OK.

[Laughter.]

Senator GRASSLEY. Well, listen. That gets me to something then that I think Congress is doing for the first time, mandating that—saying that Congress can force people to do something that I would call economic inactivity. Under your understanding of the Lopez and Supreme Court precedent, does Congress then have the authority to regulate economic inactivity? An example of that is, if I don't want to buy health insurance, does the Federal Government give—can Congress make me buy health insurance? But don't concentrate on the health insurance, concentrate on the inactivity. Can Congress regulate economic inactivity?

Professor HIGGINSON. Senator Grassley, again, if I were confirmed to sit in an intermediate court position I would be obligated to follow the law. There is guiding Supreme Court law on these issues; we've mentioned three cases. But by your reference to the view that Congress could be coercing activity, that does implicate other limitations spelled out by the Supreme Court: the Prince decision, *South Dakota v. Dole*. There are a legion of cases that you correctly do point out that Congress' authority is limited and those would have to be sensitively applied and considered.

I can assure you that if I were confirmed to be a judge I would assiduously do that, but only in the context of facts presented directly to me. It would be crucial, for me to answer the question you're asking, to be able to look at your piece of legislation, to look at what Congress explicitly has written. I do understand that several District Courts have come to different conclusions, so again, this is an issue that there will be guidance on.

Senator GRASSLEY. Well, is there any precedent of any court to force people into economic activity that they might not want to get into?

Professor HIGGINSON. I'm pausing so I don't misspeak. I think that that question is not one that I've studied closely. Again, the cases are——

Senator GRASSLEY. You probably haven't studied it closely because I don't think there's any precedent in that area.

Professor HIGGINSON. Yes. And in that context, if I were in a— if I were honored to be a judge and it were an issue of first impression, I would turn first to the text of the statute, then I would turn to the text of the Commerce Clause and other power-restricting features in the Constitution, and additionally, given your facts, I suppose——

Senator GRASSLEY. Let me ask one more question.

Senator FRANKEN. Take as much time as you'd like.

Senator GRASSLEY. Well, it kind of gets back to this then. Is there any meaningful distinction to be drawn between the Commerce Clause and what Congress says the Commerce Clause can do? Is there any distinction to be drawn between economic activity and economic inactivity?

Professor HIGGINSON. Well, the focus on economic activity has been a salient feature of the Supreme Court decisions, and if confirmed, I would apply and diligently look into that issue, the—the importance of it being economic activity.

Senator GRASSLEY. Under the U.S. Constitution, States are considered to have general police powers that permit them to enact laws for the general welfare, morals, health, and safety of their citizens—in fact, maybe to do some things that even the Federal Government can't do. Do you believe that the Commerce Clause grants Congress a power that is analogous to the general police powers of the States?

Professor HIGGINSON. Absolutely not.

Senator GRASSLEY. I guess that's it, Mr. Chairman.

Senator FRANKEN. Thank you, Senator, Ranking Member.

Senator GRASSLEY. OK.

Senator FRANKEN. Thank you, Professor. You may step down now, and we'll proceed. You're excused, I guess. And we will proceed to our second panel. Thank you very much again, Professor. And thank you to your family for—for being here.

ANDREW HURWITZ
THURSDAY, JANUARY 26, 2012
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Committee met, pursuant to notice, at 2:15 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Richard J. Durbin, presiding.

Present: Senators Durbin and Kyl.

OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Good afternoon. This hearing of the Judiciary Committee will come to order. Today we consider five judicial nominees to the Federal bench: Andrew Hurwitz, nominated to serve on the U.S. Court of Appeals for the Ninth Circuit; Kristine Baker, nominated to the Eastern District of Arkansas; George Russell, nominated to the District Court of Maryland; and two nominees for the Northern District of Illinois, John Lee and Jay Tharp. Each of these nominees has the support of their home State Senators, and I commend President Obama for sending them to the Senate for consideration.

At these hearings it is traditional for nominees to be introduced to the Committee by Senators from their home States. I am going to first turn to my Ranking Member and friend, Senator Jon Kyl of Arizona, for opening remarks he has relative to the nomination of Andrew Hurwitz. After Senator Kyl speaks, I will invite my colleagues at the witness table to make their introductions, and I know they have busy schedules, so after each of you has introduced your nominee, you are certainly free to leave.

Senator Kyl will be introducing Justice Hurwitz; Senator Mikulski and Senator Cardin for Judge Russell; Senators Pryor and Boozman for nominee Baker.

Let me turn first to the first panel, the Ninth Circuit Court nominee, and I am going to ask Senator Kyl if he would be kind enough to introduce him.

PRESENTATION OF HON. ANDREW DAVID HURWITZ, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT, BY HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Thank you very much, Mr. Chairman, and it is a privilege for me to introduce to the Committee Justice Andy Hurwitz from the State of Arizona to serve on the Ninth Circuit Court of Appeals. Senator McCain could not be here today but asked me to express his strong support for the nominee as well. A bit about Justice Hurwitz. He received his undergraduate degree from Princeton University and law degree from Yale, where he was the note and comment editor of the Yale Law Journal. He served as a law clerk to Judge Jon Newman of the United States District Court for Connecticut and Judge Joseph Smith of the U.S. Court of Appeals for the Second Circuit, and finally to Associate Justice Potter Stewart of the United States Supreme Court.

He has served on the Arizona Supreme Court since the year 2003. Before joining the Arizona Supreme Court, Justice Hurwitz was a partner in the Phoenix firm of Osborn & Maledon, where his

practice focused on appellate and constitutional litigation, administrative law, and civil litigation. He is a member of the bar both in Arizona and Connecticut and received the highest grade on the Arizona bar examination back when he took it, and I will not tell you what year.

He has argued cases before the United States Supreme Court. He served as chief of staff to the Governor of the State of Arizona, and I have known him since those days 30 years ago. That was Governor Babbitt, and then also Governor Mofford in 1988. He has been a member of the Arizona Board of Regents from 1988 through 1996, also having served as president of the board. That is the entity in Arizona that has jurisdiction over all of our universities and colleges.

He has taught regularly at Arizona State University Law College. He delivered the Willard H. Pedrick Lecture at the College of Law in 1999, and that is a big deal. I am going to be doing that this year, so I can tell you I am honored to do that. He was appointed by Chief Justice Rehnquist in 2004 as a member of the Advisory Committee on the Federal Rules of Evidence and reappointed to a second term by Chief Justice Roberts. It is very easy to see and it is obvious to those of us who have been in Arizona a long time why Justice Hurwitz was awarded the ABA's highest rating, unanimous well qualified.

So it will be my privilege to support his nomination, and I am honored to be able to introduce him to the panel today.

Senator DURBIN. Senator Kyl, thank you very much, and the other nominees, I am sure, are honored by the presence of four of our colleagues, and I would like to turn at this moment to Senator Barbara Mikulski.

Now the Committee will move to the consideration of the nominees. As is the custom of the Committee, the first panel will consist of the circuit court nominee, the Ninth Circuit nominee, Andrew Hurwitz, and I would ask, while we are changing some of the identification cards here, if Justice Hurwitz would please come to the witness table.

Remain standing for just one moment, please. If you would please raise your right hand. Do you affirm that the testimony you are about to give before this Judiciary Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Justice HURWITZ. I do.

Senator DURBIN. Thank you. Let the record reflect that the witness answered in the affirmative.

I might say to Senator Kyl, my only chance to ever be in a movie was a movie called "Contagion," which they filmed in Chicago, and I administered that oath. I thought I did it flawlessly, but I was lost on the cutting room floor.

[Laughter.]

Senator DURBIN. So I practiced for it a lot before I got here, Justice Hurwitz, as you can tell. Thank you for being here. Please at this moment, if you would be kind enough to introduce family and friends who are in attendance, and you are welcome to make an opening statement.

STATEMENT OF HON. ANDREW DAVID HURWITZ, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Justice HURWITZ. Thank you, Senator Durbin, Senator Kyl. I do not have a formal statement today. I do want to thank the President for his confidence in me in making this nomination. I want to thank Senators Durbin and Kyl for holding this hearing. And I want to thank Senator McCain for his support and also Congressman Pastor for his support in this process.

I do want to introduce some guests who are here with me today:

The most educated person in our family, Dr. Sally Hurwitz, my wife, the associate dean of the Mary Lou Fulton Teachers College at Arizona State University;

My baby brother, Gary, who is a practicing lawyer in Pennsylvania, and his wife, Holly;

And five friends of longstanding whom I will not embarrass with their titles and how I met them: We have back here Brian de Vallance; Molly Broad; Hattie Babbitt; Iris Roman Burnett, whom I have known since I was a very small child. And have I forgotten someone in this group? I do not think I have.

And I also wanted to say hello to my children, who are watching online today, my three children; to my chambers family and colleagues at the court; and—I suspect they can hear me—to my father and mother, who are no longer with us, but I think are listening from someplace else.

Senator DURBIN. Thank you, Justice.

Let me say at the outset, for those who have not attended these hearings before, that if you are waiting for Senator Kyl and I to ask those questions to catch the nominees in some erroneous ruling on a case or something, that is not likely to occur.

Justice HURWITZ. And I have made one error already, Senator. I think I forgot to introduce my friend Bartow Farr, who is back here in the audience also.

Senator DURBIN. What we do during the course of preparing for these nominations is to ask the prospective nominees to go through a series of screening committees, a number of questions, and that is just the beginning. Once they have cleared that hurdle, they are on to the White House where the White House and the Federal Bureau of Investigation go through extensive background checks. A lot of questions are asked preparing them for their next step to come before the Judiciary Committee. And if there is no controversy associated with their nomination, it is rare that these become controversial and contentious hearings. So instead we ask a few questions, but I hope that you understand that most of the questions of substance about character and knowledge and the like have been asked in detail before these witnesses arrive.

Let me turn it over first to my colleague Senator Kyl.

Senator KYL. Thank you, Mr. Chairman, and thank you for making that comment. Back when I used to be able to chair the Committee, I said something similar because I think it was somewhat disappointing for folks who would come all the way back to Washington and then go home and say was that all there was to it. Well, that is just the tip of the iceberg. All of the hard investigation and the like has occurred really behind the scenes.

But sometimes there is a question that you just want to ask to be able to get something out into the open, and I do have—incidentally, I think, Justice Hurwitz, were you playing hooky from—I

heard something about how you were not sure you could get to the hearing because you had some hearings in the court, and I think somebody said that would be an adequate excuse.

Justice HURWITZ. In fact, Senator Kyl, we had a calendar yesterday morning, and so I scooted out of town as soon as it was over. So you have not interfered with the business of the Arizona Supreme Court.

Senator KYL. That is a hard-working Justice.

I just wanted to make sure that one of my favorite subjects was covered, and that is, the ability of a person who has been active in life, including political life, as you have been, and working for political figures and a person with strong political convictions can get on the bench and put those personal convictions aside, applying the law as you believe it applies to any given case. It is not always easy for people to do, but I will say, Mr. Chairman, that Justice Hurwitz does not have a reputation as an activist judge and to my way of thinking has been quite successful in that very difficult job of separating political views from the job at hand, namely, deciding cases.

I wanted to read or at least comment on one decision, and that has to do with your personal disagreement with a very long, 200-year prison sentence that the appellant was arguing was unconstitutional. And you said in your concurring opinion that your personal

opinion was that it was unduly long, but that you had to uphold the punishment anyway because you believed you were constrained by the power of the legislature and the precedents of the United States Supreme Court.

Now, that is not easy to do. Can you explain to us how you tried to accomplish that result in your jurisprudence?

Justice HURWITZ. Thank you, Senator. I think that for every judge, no matter what his or her background, one of the most difficult parts of the job is deciding the case in front of you on the law and the facts and trying not to let extraneous things interfere. In that regard, I had some interesting mentorship earlier in my career from Justice Stewart, who once said, I think, in an opinion that he regarded a law as “uncommonly silly,” but it was nonetheless constitutional. And our job is to decide whether on the law and the facts of the case a particular statute or particular set of facts meets legal muster, not whether we would have done it differently. And I think that is something my career on the Arizona Supreme Court has demonstrated I can do and will do, if lucky enough to be confirmed to the Ninth Circuit.

Senator KYL. Thank you. Just one other point. It is related. You wrote something or said this in a comment—I think it was written down—that it is better for a court to confront issues when presented, briefed, and argued by the parties with a stake in the outcome, and yet I know at least your reputation is not one as an activist. So can you comment, if you recall what that statement was made in the context of, and what your views on how aggressively judges should approach deciding cases is?

Justice HURWITZ. Senator, I do not remember the particular context in which I made that remark, but I adhere to it. It seems to me that judges in almost every case should decide the issues in front of them as well and as completely as they can and leave for

the next case the issues that are not posed by this one, where the parties have the opportunity in front of them to make the arguments, where people have the opportunity to know that the issue is before the court and might get decided. And I think without regard to liberal/conservative sort of political labels, I think that is a judicious conservative approach to decision-making. Decide the issue in front of you. Decide it fairly. Do not duck the issues in front of you, but do not reach out for issues that are not presented in the particular case.

Senator KYL. I appreciate it. Thank you, Mr. Chairman.

Senator DURBIN. Justice Hurwitz, when you were in private practice, you argued a case, *Ring v. Arizona*, before the United States Supreme Court, and in that case the Supreme Court held that under the 14th Amendment, a jury, not a judge, is required to find the aggravating circumstances that make a defendant eligible to receive the death penalty. Interestingly enough, your opposing counsel in the case was then-State Attorney General of Arizona, Janet Napolitano, who later appointed you to the Arizona Supreme Court when she was Governor.

Could you tell me a little bit about the facts of that case and your involvement in it, both at the Supreme Court level as well as subsequent litigation on remand in Arizona?

Justice HURWITZ. Thank you, Senator. First, I should say that when I was appointed to the Arizona Supreme Court, then-Governor Napolitano said she did this so she would not have to argue against me ever again.

[Laughter.]

Justice HURWITZ. I took that with a grain of salt.

I got involved in this case because one of my law partners at the time, Larry Hammond, was one of the noted criminal lawyers in the State, and Mr. Ring's lawyers approached him to file a cert. petition, and he said, "That is not the kind of work I do but Andy Hurwitz does, and so maybe he will take this on for you." And I did because it was clear that it was an issue that the Court had to take in light of the *Apprendi* decision, which had talked about juries finding aggravating circumstances.

Our firm took on the argument pro bono, and I was helped by my friend Mr. Farr, who is in the back of the room. And it was a very expedited schedule. We took on the case in December, and the Court heard the argument in April.

I did have the privilege of arguing against an old friend and an excellent appellate lawyer, then-Attorney General Napolitano. And the issue for the Court was really whether or not the *Apprendi* decision would apply to capital cases, and the Court decided 7-2 that it did.

After that, in something that I thought was unprecedented, when we got back to Arizona and I thought I had exhausted the resources of my firm in doing this large pro bono representation, one of the Justices of the Court asked me to represent the 28 people who were still on Death Row on direct appeal in an argument about how the *Ring* case ought to apply to them. And so we had to put together a consolidated brief that covered these 28 cases, to which I argued to the Arizona Supreme Court just before I went on the bench. I learned of the decision after I got on the bench,

which I thought was a tribute to my colleagues on the bench, none of whom told me how it was going to come out. And, essentially, the court decided that the Ring decision would apply to these people. Some of them go new trials; some of them did not. And as to the remainder of them, the State agreed to reduce their sentences to life.

Senator DURBIN. Let me ask you about one other case that you presided over, the case of *State v. Gant* in 2007, involving a compelling Fourth Amendment question, namely, whether it is constitutional under the search incident to the arrest exception to the Fourth Amendment's warrant requirement for police officers to conduct a warrantless search of a person's car when the person has been arrested and placed in handcuffs in the back of a police car and the scene has been secured. You joined with the majority of your court in holding this warrantless search was not constitutional, the view later upheld by the United States Supreme Court. Can you tell us about the facts of the case and the reasoning that your court adopted?

Justice HURWITZ. Yes, and as you pointed out, Senator Durbin, I was not the author of that opinion. I think now-Chief Justice Berch was the author of that opinion.

The facts of the case, as I recall them, were that the police had a tip that Mr. Gant was coming to a particular place, and they suspected him of being involved in, I think, marijuana trafficking. When he got there, he was taken out of the car and arrested, put into the police car, and then the police thereafter searched the car. And the question, which was an open one under Supreme Court jurisprudence, at least as we viewed it, was whether or not the so-called *Shermell* exception to warrantless searches—the notion that the police are entitled to protect themselves by searching the scene around them and making sure there is nothing dangerous there—still applied once the defendant had been taken away from the car and effectively immobilized. And our court determined that because the defendant had been put in the back of the police car, there were no other people present, there was no danger to the police officers, there was no obstruction or no inability to get a warrant, that the warrant requirement of the Fourth Amendment applied. That was a 3–2 decision in our court. It was appealed to the U.S. Supreme Court, and the U.S. Supreme Court took the position of the majority, that under the circumstances of this case, the warrant was required.

Senator DURBIN. The last case I want to ask you about is one that has been the subject of law school debate as well as debate in the Judiciary Committee, and will continue to be, I guess, as long as we try to understand the Bill of Rights in the context of modern America. It was *Citizens Publishing Company v. Miller ex rel. Elleithee*, 2005. You authored a unanimous opinion holding that a newspaper was protected by the First Amendment when it ran a letter to the editor that advocated to “execute five of the first Muslims we encounter” in relation to the Iraq war. Your court held that the letter did not constitute an incitement to imminent lawless action, fighting words, or true threat of violence.

Can you tell me your reasoning in that case?

Justice HURWITZ. Yes, Senator. The letter was in a strange context.

It said the next time there is an atrocity in Iraq we should find the first five Muslims we see and execute them. So one of the questions in the case was did that mean in Iraq or in the United States. The plaintiffs in the case were Muslim American citizens from Tucson who were suing for intentional infliction of emotional distress, arguing that this letter was actionable. And what we did, I think, was applied classic First Amendment law, which is that, in general, we should not restrain newspapers from saying things; in general, speech is, as Justice Brandeis once said, the great disinfectant, that we enter into the American debate and we have this speech and people say bad things and we respond to them by telling them they are wrong.

In this case we found that, in context, this really was not truly a threat against anybody living in Tucson. It was hyperbole about the atrocities in the war, and that while it was a reprehensible statement and one that ought to be condemned, it ought not be condemned by the courts by removing it from the paper or making the newspaper liable, but condemned by responsible citizens responding to the statement, as they well did in the Tucson citizen letters to the editor section.

Senator DURBIN. Senator Kyl, anything further?

Senator KYL. No. Thank you.

Senator DURBIN. You get the closing argument. Is there anything you would like to say before——

Justice HURWITZ. I have been a lawyer long enough to know not to say anything when it is not needed, and so I have no closing remarks, sir.

[Laughter.]

Senator DURBIN. Justice Hurwitz, thank you for joining us today. We are honored.

Justice HURWITZ. Thank you both.

Senator DURBIN. And we thank all your friends and family for joining you as well.

Senator KYL. Kristine Baker, let me ask you a question that relates back to the testimony of Justice Hurwitz from Arizona. You will recall I said he had firm political opinions, but at least has a reputation of being able to distinguish those from his judicial decisions and the way he approaches judging.

ADALBERTO JORDAN
TUESDAY, SEPTEMBER 20, 2011
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:32 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Amy Klobuchar, presiding. Present: Senators Klobuchar, Hatch, and Lee.

OPENING STATEMENT OF HON. AMY KLOBUCHAR, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator KLOBUCHAR. I am pleased to call this nominations hearing of the Senate Committee on the Judiciary to order. Our Ranking Member today is Senator Hatch, and I know we have several members here to speak, to introduce. We have five judicial nominees today, so I would like to call upon my colleagues to introduce the nominees from their home State.

Now we will turn from the Midwest to Florida. I think Senator Rubio was here first, and—you want Senator Nelson? Very nice. Senator Nelson, oh, my goodness, Senator Nelson will go first, and we are pleased to have both of you here on behalf of the Florida nominee.

PRESENTATION OF ADALBERTO JOSE JORDAN, NOMINEE TO BE CIRCUIT JUDGE FOR THE ELEVENTH CIRCUIT, BY HON. BILL NELSON, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator NELSON of Florida. Well, this reminds me who is the senior Senator and who is the junior Senator. When Bob Graham was my senior Senator, he always expected me to serve him coffee.

[Laughter.]

Senator RUBIO. I will be right back.

[Laughter.]

Senator NELSON of Florida. Well, the two of us are here unanimous because this is an excellent appointee by the President, and we urge upon the Committee for quick confirmation for the Eleventh Circuit Court of Appeals.

Madam Chairman, Judge Jordan will end up being the first Cuban American to sit on the court of appeals. That is significant in itself, but when you look at his life, all the way from being magna cum laude, the fact that he was a walk-on at the University of Miami baseball team and made the team, the fact that he was an Assistant U.S. Attorney and served with distinction there and then was picked by President Clinton to be a Federal district judge, so he has been a judge now for well over a decade. And among all of his peers have had nothing but glowing comments once the President made his decision.

And so this is a great day, and I want to just shorten my comments so that my colleague—and you are very kind—can say something about the historical significance of judge Jordan's nomination.

Senator KLOBUCHAR. Very good. Thank you.

Senator Rubio.

PRESENTATION OF ADALBERTO JOSE JORDAN, NOMINEE TO BE CIRCUIT JUDGE FOR THE ELEVENTH CIRCUIT, BY HON. MARCO RUBIO, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator RUBIO. Thank you, and I will also be brief because I

think his experience and his resume will speak for itself. I just want to echo a few things.

First of all, obviously as a community we are very proud of Judge Jordan's nomination and look forward to his appointment.

I would add a couple things. He is, as I am, a law school graduate from the University of Miami. He is a double Hurricane, I should say, because also his bachelor's degree was from there. He has been serving for 12 years on the bench in the U.S. District Court for the Southern District of Florida. At the time of his appointment, he was only 37 years old. He remains very active in our community. He is involved in teaching both at the University of Miami School of Law and at a newer place that is really growing rapidly, the Florida National University College of Law as well. I think his knowledge of the law is demonstrated further in part by his work as the chief of the Appellate Division in the Office of the U.S. Attorney for the Southern District of Florida, which is a very active district in his time there practicing as an attorney. He spent time as a clerk at the U.S. Supreme Court for Justice Sandra Day O'Connor, and he has served as a clerk to Judge Thomas Clark of the Eleventh Circuit Court of Appeals. So I am obviously honored and proud to be here introducing him to the Committee, and I look forward to your full consideration of his nomination. Thank you.

Senator KLOBUCHAR. Thank you very much. Thank you both for coming, and we look forward to hearing from your nominee.

We will start with Judge Jordan, if he wants to come up. Do you say "JOR-din" or "Jor-DAN" ? No, really, tell me. Tell me. "JOR-din," good. It sounded like your Florida Senators had a little bit of an accent, but they always have an accent anyway.

We are going to swear you in first. Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge JORDAN. I do.

Senator KLOBUCHAR. Very good. Would you like to introduce family members or friends that are here with you, Judge Jordan?

STATEMENT OF ADALBERTO JOSE JORDAN, NOMINEE TO BE CIRCUIT JUDGE FOR THE ELEVENTH CIRCUIT

Judge JORDAN. I would. Thank you very much.

Senator Klobuchar, Senator Hatch, Senator Lee, I am honored to be here. I am also deeply grateful to the President for nominating me, and I would like to thank the Committee for scheduling the hearing and Senators Nelson and Rubio for their kind words and support.

I do not have any remarks, but I would like to recognize family members and friends. My wife, Esther, and our daughters, Diana and Elizabeth, are here; as are my brother George and one of our nephews, Carlos.

Several family members could not make it, but they are watching through the Committee's webcast in Miami and elsewhere: my mother, Elena; my mother-in-law, Flor; my sister-in-law, Connie; my brother-in-law, Domingo, and his girlfriend, Grace; and our nephews, George, Matthew, and Dominic; our nieces, Emma and Amanda; and my step-brother and step-sisters and their families.

Some of our chamber staff have flown here for the hearing. The rest are watching back home. Also here are a number of former clerks and friends. I am very fortunate for their friendship and for their support. Thank you.

Senator KLOBUCHAR. Very good. Thank you so much. I am just going to ask you a few questions here at the beginning.

I am a former prosecutor myself, and I know you served in the Appellate Division, the chief of the Appellate Division of the United States Attorney's Office. How has that experience shaped your work as a judge?

Judge JORDAN. Well, it certainly helped me to figure out how to read records and learn hopefully what mistakes can be made and which ones can be avoided. I also argued and wrote a fair number of briefs while I was there at the office and was able to practice before the Eleventh Circuit for the majority of my time at the U.S. Attorney's Office. So it was certainly a different type of work than the one that I am doing now, but it certainly helped me to learn the law of the circuit, the traditions of the circuit, how things operate. And I think that that certainly helped prepare me, at least in part, for the job that I currently hold.

Senator KLOBUCHAR. And then you served for 12 years as a judge, and what surprised you about that job? And have you changed over the years in your philosophy as a judge?

Judge JORDAN. I do not think I have changed in my philosophy. Some judges who gave me advice when I came on told me it would take about 2 to 3 years to get your sea legs in a district like Miami, and I think they were basically right.

I was surprised at the speed of cases in a district like Miami where the criminal workload is pretty heavy, and we are in trial all of the time. I think last year we ended up maybe second or third in the country in trials, and for the past 4 or 5 years before that No. 1. So we are in trial a lot, and that is not something you get used to right away.

It also took me a little bit of time to get used to making calls on the spot, off the cuff, during a trial. That is not something you do on a normal, everyday basis as an appellate attorney. But you learn quickly that you better do it, or else things are going to get clogged up mighty fast.

Senator KLOBUCHAR. Very good. You are now going to be serving on a panel of judges on the circuit court, and talk about how you think you are going to handle that and trying to seek agreement. You have clearly gotten agreement between your two Senators that support you, so that is a good beginning. It is not that easy to do around here. So tell me about how you think you will handle the job differently than yours now and how you think you would go into that consensus building.

Judge JORDAN. It certainly is a different job. I think I am going to be helped in part by the fact that I have sat a number of times by designation on the circuit, and I have sat with I think half or a little bit over half of the judges on the circuit already.

The job of sitting by designation is certainly not the job of sitting as a full-time appellate judge. As a district judge in the Eleventh Circuit, you sit for just 2 days out of the 4, so you are able to fly in, hear 2 days' worth of cases, and then get your assignments and

go back home. So the work will certainly be different in terms of volume.

But I think I understand what the process is like and what consensus building is about and how to be civil to your colleagues even when you might disagree with a position and how to try to reach middle ground on cases where that middle ground can be reached. So I hope that those experiences have prepared me well for the job that I will hopefully have.

Senator KLOBUCHAR. Very good. I really appreciate your answers. They were good ones.

I am going to turn it over to Senator Hatch.

Judge JORDAN. Thank you.

Senator HATCH. Welcome back to the Judiciary Committee. We are happy to have you here.

Judge JORDAN. Thank you, Senator.

Senator HATCH. I appreciate your comments on the issue of judicial impartiality. Some have argued that the judicial branch ought to be very much like the legislative branch where substantive interests are actually represented. On the other hand, the judicial oath requires impartiality without regard to the identity of the parties. You know that because you have, of course—you have to take the oath and you understand that. Each individual certainly brings his own background and experiences with him or her to the bench, but please comment on a judge's obligation to step back from that and to judge cases impartially, if you will.

Judge JORDAN. I think that is one of the paramount goals of a judge in our system. We are supposed to be the neutral arbiters and judge and decide cases without regard to who it is who is before us or what their views are. I have certainly strived to try to do that in my almost 12 years on the district court bench in Miami. I do not think that our personal views have any place in what we do on a day-to-day basis as judges. We are all human beings, of course, but I think as a judge you need to try and strive very, very hard to make sure you are deciding the case on something other than your own preferences and views, whatever those might be. So I have strived and I hope I have achieved impartiality in my years on the bench in Miami.

Senator HATCH. Well, thank you. You have been a Federal trial judge for a dozen years. If confirmed, you will instead review the decisions of Federal trial court judges. Appeals are not supposed to be simply do-overs, just another bite at the apple. Please comment on the difference between these two roles of the trial court and appeals court judges in our judicial system.

Judge JORDAN. Well, there certainly are differences, and you do not get to have complete do-overs in the court of appeals on a whole range of cases. Obviously, questions of law get reviewed de novo, without any deference being given. But when you are talking about a judge's findings of fact or an evidentiary ruling which is subject to an abuse of discretion standard or things like that, I think appellate judges need to keep in mind that the trial judge is usually in the best vantage point and the best position to be able to make those calls, knows the litigants, knows the history of a case, knows what lawyers have argued, what might be missing, what might be going on in a case.

I think as district judges we hope that those calls are given deference when appropriate when our cases go up to the court of appeals, and I think and I hope that I will be able to do that if I am

fortunate enough to be confirmed. I am confident that I can.

Senator HATCH. Thank you. I am certainly going to support your confirmation, and we congratulate you for being willing to serve in this very important position.

Judge JORDAN. Thank you very much, Senator.

Senator KLOBUCHAR. He did not even ask you the Christmas tree question, so you are really in good shape.

Judge JORDAN. Christmas trees do not grow in Miami.

[Laughter.]

Senator KLOBUCHAR. OK. Senator Lee.

Senator LEE. I have got one question I am just dying to ask you. As someone who has argued 36 appellate cases, briefed over 125 others, you made the transition when you became a district judge to that status, having probably had to jettison most of your appellate standards of review to one far corner of your brain. Which transition do you think will prove to be the more difficult one: the transition from appellate litigator to district judge or district judge to appellate judge—subject, again, to all the deferential standards of review?

Judge JORDAN. I think the first transition was more difficult. You know, as an appellate lawyer you get to sometimes sit in an ivory tower and pontificate about what might have happened or what theories might have been argued or what might be the best result in a world where everything else might be equal. And that is not the world of a district judge, not in a district like ours. So it takes a while to get used to that transition.

I did try some cases when I was an Assistant U.S. Attorney, so the trial courtroom was not foreign to me, but it certainly was not my specialty. So I think that transition was more difficult. I have sat with the Eleventh Circuit a number of times over the years and authored a number of opinions, so I think going back into that mind-set of what the appropriate standards of review are and working with colleagues and panels instead of being a lone judge making decisions at the trial level will not be as difficult. It will be a transition, but I do not think it will be as difficult as the first one that I made.

Senator LEE. I have got just one follow-up to that question, which is: Since the time when you were an appellate attorney, we have had the *Blakely v. Washington* era begin and sort of run its course. How substantial do you think the shift is now in the role of the appellate courts when you were an appellate attorney often handling criminal cases up on appeal and how it is now in the wake of *Blakely v. Washington* and its progeny?

Judge JORDAN. On sentencing issues, you mean?

Senator LEE. Yes.

Judge JORDAN. You know, I think at least I can comment on our circuit. I am certainly less familiar with the law in the other circuits. In our circuit I think that the Eleventh Circuit gives a fair amount of deference to district judges when they are applying *Blakely*, *Booker*, et cetera, as long as judges are reasoned and explain why it is that they might be imposing a sentence outside of

the guidelines in a given case.

But the Eleventh Circuit is also not shy about reversing judges when they think they have gone too far, and they have done so on a number of occasions in pretty celebrated cases. So I think at least in our circuit, district judges know that if they have a reason to vary from the guidelines and express it and cogently explain why they are doing it and do not go crazy, there is a good chance that the circuit is going to give deference to that decision.

So I think——

Senator LEE. But probably more reversals than you had in criminal sentencing prior to Blakely.

Judge JORDAN. Well, you know, I do not know the statistical number, but they would be different reversals because before Blakely and Booker, the majority of sentencing appeals—we did them from the U.S. Attorney's Office when I was appellate chief—were basically guideline interpretations. There were not many departure appeals. Most of them were about whether or not the district judge correctly interpreted or applied a given guideline. So I think with regards to guideline application, the reversal rate probably has stayed about the same, which is relatively low. But now, of course, there is sentencing where the guidelines are not mandatory, and that is a new sort of deference that did not exist before.

So they are two sort of target groups that you probably could not compare very well.

Senator LEE. Thank you.

Senator KLOBUCHAR. Do my colleagues have any additional questions?

[No response.]

Senator KLOBUCHAR. Well, thank you very much, Judge Jordan. We enjoyed your appearance here, and we wish you luck, and we will see you again. Thank you.

Judge JORDAN. Thank you very much.

Senator KLOBUCHAR. Very good.

WILLIAM KAYATTA
WEDNESDAY, MARCH 14, 2012
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:50 p.m., Room SD-226, Dirksen Senate Office Building, Hon. Amy Klobuchar presiding.
Present: Senators Franken, Grassley, and Lee.

OPENING STATEMENT OF HON. AMY KLOBUCHAR,
A U.S. SENATOR FROM THE STATE OF MINNESOTA
Senator KLOBUCHAR. (Off microphone) welcome the family and friends that have accompanied all of you today. It looks like a full crowd out there, and I know that you are going to—the nominees will be able to introduce their friends and family shortly.

We are considering, as you know, five judicial nominees today. And, first, I would like to call upon my colleagues, who are all gathered here, excited to introduce the nominees from their home State.

So I think we will start here with Senator Snowe, and then Senator Collins, Senator Menendez, and Senator Harkin.

So, Senator Snowe, please begin.

PRESENTATION OF WILLIAM J. KAYATTA, JR., NOMINEE TO BE
U.S. CIRCUIT JUDGE BY THE HON. OLYMPIA SNOWE, A U.S.
SENATOR FROM THE STATE OF MAINE

Senator SNOWE. Thank you, Chair Klobuchar and Ranking Member Grassley, for holding this hearing today to consider the nomination of Mr. William J. Kayatta, Jr., to succeed the honorable Kermit Lipez on the United States Court of Appeals for the First Circuit.

I join my colleague, Senator Collins, in enthusiastically endorsing this nomination, and I urge the Committee to recommend confirmation of Bill Kayatta to this critical position on the Federal bench.

Today is certainly one the Kayatta family will always remember.

So I also want to welcome Bill's wife, Anne Swift-Kayatta, and their daughter, Katherine. And I know their younger daughter, Elizabeth, could not be here today due to a job interview, which is sort of what her father is doing today, as well.

Let me begin with a story Bill's family likely knows well. When Bill held his first hearing with counsel at the Special Master for the U.S. Supreme Court, a distinguished assignment, he assumed the bench and asked 20 or so lawyers to identify themselves for the record.

When they were finished, Bill began to explain the order of proceeding, only to be interrupted by the court reporter, who asked, "And who are you? "

So with that, let me tell you more about who this stellar nominee is.

First, I want to commend President Obama for his decision to nominate Bill Kayatta for a seat on the first circuit. This is a case of the President selecting a superbly qualified nominee who can and should attract strong bipartisan support in the Committee. Educated at Amherst College and Harvard Law School, Bill has

now practiced law for 32 years. Before beginning his career as a litigator, he clerked for former first circuit court of appeals Judge Frank Coffin, a true pillar of the law and a former Congressman from Maine who became Bill's lifelong mentor, as well.

There is ample evidence of the professional respect for Bill's intellectual acumen and legal accomplishments for the Committee to consider. To name just a few, he is an elected member of the American Law Institute, a fellow and regent of the American College of Trial Lawyers, a member of the American Bar Foundation, and past president of the Maine Bar Foundation.

He was also asked to co-edit the first, entirely new edition of the treatise Maine Civil Practice, led by the late Charles Harvey, Jr., one of Maine's most respected legal practitioners.

Through his reputation for excellence in handling complicated matters, Bill Kayatta has developed a law practice national in scope. He is admitted to practice in no fewer than five Federal circuits and has been lead counsel in sophisticated class action liability cases from Maine to Florida to Delaware to California, involving both major corporations, as well as individuals.

Bill has prevailed in every trial but two in the last 32 years of his practice and has won 31 of 37 appellate arguments. He has litigated \$43 billion in energy contracts, handled 23 State class actions against the world's largest car manufacturers, and certified a class of 500 to 800 disabled children seeking in-home mental health services.

He also has experience in the U.S. Supreme Court, where he has argued two cases, submitted merit briefs on three cases, and worked on cert briefs in six additional cases.

But nothing stands out more than Bill's current honor which I mentioned earlier, to serve as a Special Master for the U.S. Supreme Court in a dispute among the States of Kansas, Nebraska and Colorado. Selected by the Supreme Court from the approximately one million lawyers in the country, Bill was chosen for his keen intellect, experience and integrity to hear and recommend a decision to the Court. In short, there is no higher tribute for a practicing lawyer in America.

A tremendous steward of the common good, especially the cause of access to justice for all, Bill has been bestowed with many well earned accolades, such as a Champion of Children by the Maine Children's Alliance. Moreover, he has garnered the Maine Equal Justice Partners Appreciation Award, and received a Disability Rights Center special recognition award.

For all of these reasons I have discussed, Bill Kayatta has rightly earned the American Bar Association's highest rating of unanimous well qualified.

As you know, this is the gold standard of ABA ratings, reflecting the highest level of intellect, character, and judicial temperament. It is a rating reserved only for those who warrant the ABA's strongest endorsement.

So thank you, again, Madam Chair and members of the Committee, for this privilege and opportunity to recommend a candidate of Bill Kayatta's caliber.

Upon your consideration and review of his exceptional merits, his record and qualifications, I would hope that you would review and

report out his nomination favorably.

Thank you.

Senator KLOBUCHAR. Well, thank you very much, Senator Snowe.

Mr. Kayatta is lucky to have not one, but two Senators here on

his behalf today. We have Senator Collins of Maine.

PRESENTATION OF WILLIAM J. KAYATTA, JR., NOMINEE TO BE

U.S. CIRCUIT JUDGE BY THE HON. SUSAN M. COLLINS, A U.S.

SENATOR FROM THE STATE OF MAINE

Senator COLLINS. Thank you very much, Madam Chairman, Senator

Grassley, Senator Franken. I am extremely pleased to join

Senator Snowe before this distinguished Committee today to wholeheartedly

recommend to you William Kayatta of Cape Willow

Smith, Maine, who has been nominated to serve in the U.S. Court

of Appeals for the First Circuit.

Bill is an attorney of exceptional intelligence, extensive experience,

and demonstrated integrity. He is very highly respected in

Maine's legal community.

While I know that the Committee is already familiar with his

many qualifications and Senator Snowe has already outlined many

of them, let me just emphasize a few.

In 1980, Bill joined the firm of Pierce Atwood in Portland, Maine,

where, over the subsequent 32 years, he has specialized in complex

civil litigation at both the trial and the appellate level. He has

served as chairman of both the Maine Professional Ethics Commission

and the Maine Board of Bar Examiners, as well as president

of the Maine Bar Association.

In 2002, Bill was inducted into the American College of Trial

Lawyers. And in the year 2010, he was selected by his peers to the

college's board of regents.

Simultaneously, Bill has maintained a substantial pro bono practice.

In 2010, he received the Maine Bar Foundation's Howard H.

Dana award for career-long pro bono service on behalf of low income

Mainers.

As Senator Snowe has mentioned, in 2011, the U.S. Supreme

Court appointed him as Special Master in *Kansas v. Nebraska* and

Colorado, an original water rights case, an indicator of the Court's

confidence in his legal abilities.

Finally, as Senator Snowe has also mentioned, he has earned the

American Bar Association's highest rating—unanimously well

qualified—reflecting the ABA's assessment of his credentials, his

experience, and his temperament.

Bill's impressive background makes him eminently qualified for

the seat on the first circuit. His 30-plus years of real world litigation

experience would bring a needed perspective to this prestigious

court.

Madam Chairman, the first circuit has the fewest judges of any

circuit, and, consequently, any vacancy there is felt most acutely.

In January of this year, Judge Kermit Lipez took active senior

status after decades of outstanding public service to Maine and the

Nation, for which I would like to thank him. While Judge Lipez has

agreed to carry a full caseload over to his senior status, he has

made it very clear that he will carry that load only until the beginning

of September. At that point, the caseload would have to be

distributed among the remaining five judges.

For this reason, as well as in recognition of the nominee's extraordinary qualifications, I urge the Committee to act expeditiously on Mr. Kayatta's nomination in order to avoid a real problem for the first circuit in handling its caseload.

Madam Chairman, members of the Committee, the State of Maine has a long, proud history of supplying superb jurists to the Federal bench. I know that, if confirmed, Mr. Kayatta will continue in that fine tradition.

I urge the Committee to act as quickly as possible on the nomination and to move it forward to the Senate floor, for he deserves overwhelming bipartisan support.

Thank you very much.

Senator KLOBUCHAR. Thank you very much, Senator Collins.

We will ask our first nominee, Mr. Kayatta, to come forward.

And if you could remain standing and raise your right hand, Mr. Kayatta—thank you so much—and I will administer the oath.

[Nominee sworn.]

Senator KLOBUCHAR. Now, Mr. Kayatta, if you would like to introduce—we have heard a lot about you from the Senators from Maine, and we would love to see if you want to introduce anyone who is here, friends or family.

STATEMENT OF WILLIAM J. KAYATTA, JR., NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE FIRST CIRCUIT

Mr. KAYATTA. Thank you, Madam Chair and Ranking Member Grassley and Senator Franken, for giving me this opportunity to be here today. It is a tremendous and inspiring privilege for someone who has grown up and spent his life working in Maine to be introduced to this Committee by Senator Snowe and Senator Collins.

Maine is a small state. We get to know each other pretty well. And there is no one in Maine who is more widely respected than these two extraordinary women. So I am very honored by their introduction today.

I would also like to thank Representative Mike Michaud and Representative Chellie Pingree and their selection committee for suggesting my name to the President. And, obviously, I would like to thank very much the President for having the confidence in me to make this nomination.

Senator Snowe was very gracious to introduce my family, my wife, Anne, and daughter, Katherine, and her fiance, Ian Gilbert, who were able to come here today. My daughter, Elizabeth, as Senator Snowe mentioned, is doing her own job interview as we sit here today.

My parents, I know, wish very much that they could come, but they, together with my colleagues and friends at my law firm, Pierce Atwood, will take advantage of the Web broadcast.

Senator KLOBUCHAR. Always exciting.

Mr. KAYATTA. Yes. Although I might be fearful of watching it myself.

[Laughter.]

Mr. KAYATTA. And with that, I know how busy the members of this Committee are, and so I will refrain from any further comments.

Senator KLOBUCHAR. Very good.

Do you want to begin, Senator Grassley.

Senator GRASSLEY. Usually, I do not get that right very much.

Senator KLOBUCHAR. Well, I thought I would do that to be nice

and bipartisan. We just passed a bill today.

Before you—Senator Corker, do you want to——

Senator GRASSLEY. Yes. Let us start with Senator Corker.

Senator KLOBUCHAR. Right. Do you want to go and talk about your—could we just take a break to do this? All the people involved in Rules.

Do you mind, Mr. Kayatta.

Mr. KAYATTA. Not at all.

Senator KLOBUCHAR. Senator Grassley.

Senator GRASSLEY. The first question comes in regard to the fact that in your position, you will probably be considering some cases of crime, but you seem to lack experience with criminal cases. In answer to your questionnaire, your private practice has not included any criminal cases.

So I give you a chance to tell us and share with us about your legal background to ease concerns that we might have about lack of criminal law experience.

Mr. KAYATTA. Yes, Senator. Thank you. And it is correct, I have had no experience in representing parties in criminal proceedings, either the State or the defendants.

I have had—and I do think that is an area where I will come in with a fair amount of work to do to bring myself appropriately up to speed.

Now, I have had some exposure to criminal law in several respects.

My year clerking, I obviously saw a full year's worth of cases that the first circuit had, including all the criminal cases.

I also had the privilege for 8 or 9 years of representing quite a few police officers who were sued in suits that raised issues of Fourth or Fifth Amendment procedure, excessive force, other type issues, and that required me, even though I was not representing parties in criminal proceedings, it required me to get a pretty good understanding of the rules of procedure both under the Fourth Amendment, the Fifth Amendment, the Eighth Amendment, and other issues that arise, and to also spend a fair amount of time understanding how the law enforcement process worked.

Finally, my civil practice involves—I have not specialized in any one particular area in my civil practice. I have moved—one year, it would be an antitrust case; another year, it would be an energy regulation case; another year, a securities case. And so that has given me an opportunity to learn how to become familiar with the body of law that I had not previously been familiar with, and I would hope that that training would be something that I could bring to bear to supplement the limited experience in criminal law that I have described.

Senator GRASSLEY. There is nothing wrong with a nominee like you being involved in parsing politics, but prior to serving on the standing committee, you participated in Obama for President meetings and, also, donated.

Did politics affect your evaluations in any way of anything you have done?

Mr. KAYATTA. I can think of nothing I did on the standing committee or, frankly, not much I will expect that had been affected by that.

Senator GRASSLEY. As a young attorney, in 1984, you represented

the city council of Portland in a suit alleging the city violated an individual's Second Amendment rights by denying him a gun permit.

A three-judge panel on the first circuit held that there was no Second Amendment.

Among the cases cited was by the first circuit to support his opinion. It was a 1976 case of *U.S. v. Warin* that held, "The Second Amendment guarantees a collective rather than an individual right."

Do you recall, in defending the city council, whether you argued the Second Amendment only provided a collective right?

Mr. KAYATTA. I don't specifically recall that, Senator. However, I'm quite sure that as a lawyer for the city, having the ethical duties that a lawyer would have in representing a municipal government in litigation, I certainly—it's highly likely I would have raised the law as it existed at that time in any briefing.

And I'm sure the first circuit followed that law then as today.

The first circuit would follow the materially different law that we now have.

Senator GRASSLEY. If you had any briefs in that case, would you be willing to provide my staff and me with a copy of any brief you filed?

Mr. KAYATTA. Yes, I would, Senator.

Senator GRASSLEY. In *Heller*, as well as in *McDonald v. Chicago*, the Supreme Court held that the Second Amendment is an individual right.

Do you personally agree that the Second Amendment confers an individual right rather than a collective right?

Mr. KAYATTA. Senator, I don't think it's appropriate that I express my personal beliefs. Among other reasons, I don't think my personal beliefs would be something that I would bring to bear in deciding cases as a judge.

I am familiar with *Heller* and with the current state of the law and would certainly have no hesitancy in following and enforcing that precedent.

Senator GRASSLEY. That is good. Thank you.

In *McDonald*, the Supreme Court further held that individual rights apply to the States. Would your same answer apply there, that the precedent set by *McDonald* you would follow as a judge?

Mr. KAYATTA. Yes, it would, Senator Grassley.

Senator GRASSLEY. Let me ask one more question. Then I will move on.

You were a member of the American College of Trial Lawyers' ad hoc committee on judicial compensation that issued a report that was highly critical of the current pay of Federal judges.

Knowing what you know about judicial pay, are you sure that you are able to accept the pay for judges as currently set by Congress?

Mr. KAYATTA. I confess, Senator Grassley, I'm probably an even more enthusiastic proponent of increased judicial pay than I was then.

Yes. I certainly—you know, I don't come from a large metropolitan area and the amount of judicial pay for someone like me is a very substantial—in the State of Maine, it is an extraordinary amount, and I would be privileged to take this position.

I do continue to believe, on a national level, that the prolonged reduction in judicial pay that has occurred as a result of the combination of no pay increases and inflation over time is a serious matter for Congress to consider.

Senator KLOBUCHAR. Very good. Thank you very much, Senator Grassley.

You should know, as he asked about that pay issue, that I once called Senator Grassley and he was in a cafe eating apple pie that he claimed was like \$1.29 or something like that. So very careful with the money.

Mr. KAYATTA. Perhaps I'll need the name of that.

Senator KLOBUCHAR. I wanted to, first of all, just—I know Senator Grassley had asked appropriately about the question about politics, but I also would note that you have the support of both Republican Senators from the State of Maine. And I also notice that you actually were a classmate of Justice Roberts and have spoken of him positively.

And then, also, in 1981, he identified you as a potential candidate for the special assistant attorney general during the Bush Administration. So I just wanted to put that on the record. It appears as though you have worked well with people of both parties. So I wanted to ask you some questions about your experience, first of all. I think for most lawyers, the opportunity to argue a case before the Supreme Court represents the ultimate career highlight, and you have argued two cases there.

Can you tell me about how your experiences as an appellate advocate will inform you in how you approach the job for which you are nominated?

Mr. KAYATTA. Yes, Madam Chair. One, a sense of humility, I managed to, with one small exception, lose both cases 9–0.

Senator KLOBUCHAR. I did not note that. I might not have asked that question. I was trying to ask an easy question. But go ahead.

Mr. KAYATTA. On one of the cases, my dear dad, who always rooted for me in every case, asked me how I could lose a case 9–0 and I told him it was because there were not 10 justices on the court.

For a lawyer who reveres the rule of law, who regards this country as an exceptional country that is built on the rule of law, to appear before the Supreme court is inspiration, it's emotionally moving, and it left me with an even higher regard for what an extraordinary system we have in this country.

And I think that would heighten my sense of responsibility as a judge to live up to those expectations and to understand the responsibility that every judge has to stand for the rule of law and to protect the great institutions that have in this country.

Senator KLOBUCHAR. Thank you. I noted that Senator Collins and Senator Snowe talked about your pro bono work, and I think that is such an important part of being a lawyer.

Do you want to talk about why you got started with pro bono work and how you think we can make sure that that continues as part of the practice of law?

Mr. KAYATTA. I'm hesitant to talk about my own pro bono work. I don't think it's something that one crow's about. I think every lawyer—as a lawyer, you're actually given by the government a license,

a monopoly of a sort, to practice law, and I've always thought that with that privilege comes some responsibility to do more than use that license solely for your self.

In that respect, though, I've done much less than many people I know who dedicate themselves full-time to those causes. So I feel what I did was something that every lawyer should do.

Senator KLOBUCHAR. I just have one last question. If confirmed, you will be serving on the circuit court, as we know, and you will be hearing cases with a panel of judges.

Could you talk about the importance of seeking out agreement with your colleagues? Is there value in finding common ground, even if it is a slightly narrower ground than you might like to get a unanimous opinion on appellate cases?

Mr. KAYATTA. My experience in virtually everything I have done is that several people on a common mission, if they listen to each other, if they have respect for each other and they work hard, are probably likely to come up with a better, more informed decision than someone working on his or her own.

So I do think an important part of serving on a circuit court is communicating with the other judges on that court regarding decisions and listening to their different perspectives.

Senator KLOBUCHAR. Very good. Thank you very much.

I think Senator Franken was next. Thank you.

Senator FRANKEN. Thank you, Madam Chair.

Mr. Kayatta, congratulations on your nomination. My wife is from Portland and my in-laws are all still in Maine, and I love the State and I recognize your accent.

[Laughter.]

Senator FRANKEN. You were the American Bar Association's lead evaluator during Elena Kagan's nomination to the U.S. Supreme Court. What types of things did you look for or do you look for when you are evaluating a judicial nominee?

Mr. KAYATTA. I actually had no personal input or choice as to what I would look for. The criteria are basically that we look for ethics, judicial temperament, and professional competence. And those are the three criteria that are to be applied. And when I was on——

Senator FRANKEN. Would you repeat those? Ethics, what?

Mr. KAYATTA. Temperament.

Senator FRANKEN. Temperament.

Mr. KAYATTA. And professional competence.

Senator FRANKEN. Well, within those you must have some certain personal criteria that you apply.

Mr. KAYATTA. I think the—in terms of digging into each of those areas, I think that what I looked for was what other lawyers and judges would look for. And I say that because the ABA process, as it was implemented while I was on the ABA standing committee, in many respects, simply channeled a peer review of a nominee. And by that, I mean we would speak to, in that case, hundreds of people familiar with the nominee and ask them what their assessment was under those criteria and ask them to provide examples and facts that would substantiate that. And it was then putting together the whole body of that.

Often, that peer review that would get back would speak for

itself and did not require a large interpretative undertaking by the person doing the evaluation.

Senator FRANKEN. Got it. And you received—your recommendation was unanimously well qualified. Is that correct?

Mr. KAYATTA. I did, yes.

Senator FRANKEN. That means everyone agreed, right, unanimously?

Mr. KAYATTA. That means every member of the Committee selected that evaluation, yes.

Senator FRANKEN. That was not a trick question.

[Laughter.]

Senator FRANKEN. Sometimes overlooking the obvious is a bad thing.

After graduating from law school, you served as a law clerk on the first circuit court of appeals, the court to which you are now nominated.

Did you learn any lessons as a law clerk that will help you as a judge on the court?

Mr. KAYATTA. Yes, I did. I learned that a lot of hard work was involved. I also learned something I think is good for every law student. There's a tendency sometimes when you're in law school to become impressed with one's own perception of one's intellectual prowess.

And serving a year for Judge Coffin of the first circuit, I realized that there is a lot more wisdom involved in the job than I had, and I had a lot to learn and needed a lot of experience to learn.

Senator FRANKEN. And, finally, I hate to return to your pro bono work, but I just wanted to ask you—one case that you did that, you were lead counsel in a lawsuit on behalf of 800 Medicaid-eligible children who had been denied in-home mental health services. That seems like a lot of work. Why did you decide to take that case?

Mr. KAYATTA. I had been involved in a group that was trying to encourage members of the private bar to spend more time and, also, to devote their particular talents and resources to assisting those who were full time helping those who not afford a lawyer. And one of the major groups in the State came to me and said, "We have this very large, very complex case that we believe the law is not being enforced and that if it were enforced, it would be a win-win both for the children and for the government's budget. But they couldn't take it on—they didn't have the resources—and they asked if I would take it on. And with the permission of my partners, one partner in particular, Margate O'Keefe and a number of other lawyers who agreed to work with me, we took that one for many years.

Senator FRANKEN. Thank you and, once again, congratulations to you and to your family.

Mr. KAYATTA. Thank you, Senator.

Senator FRANKEN. Thank you.

Senator KLOBUCHAR. Very good. Senator Lee.

Senator LEE. I would not let anybody give you a hard time about the 9–0 losses.

Your former classmate, Chief Justice Roberts, had a 9–0 loss not too long before you went onto the Supreme Court. Sometimes the court gets it wrong.

In any event, you have got one of those quill pens, I am sure, each time you argued that.

Mr. KAYATTA. Yes, I did.

Senator LEE. And that is a victory in and of itself.

As a Federal judge, you will be called upon on an almost constant basis to evaluate what could potentially be defects in any case. When you come across a case in which Article 3 standing is, arguably, deficient, what factors would you look to in deciding whether or not there is standing and what might you do in a case in which you are in doubt, you are sort of wondering which way the scales tip?

Mr. KAYATTA. Well, not profession to be an expert on standing, let me say that it's my impression that as a judge, I would actually be obligated in every case, whether the issue of standing has been raised or not, to make a determination that I have been given the power and the court I am on have been given the power to do anything at all. And without standing, a Federal court— if the parties who come before the court who had brought the case lacks standing, then the court lacks jurisdiction, generally, other than some odd unusual circumstances.

Senator LEE. Regardless of whether they raise it.

Mr. KAYATTA. That's correct. I think it's one of those issues that the court could—we are—the Federal courts are courts of limited hours and limited jurisdiction, and part of being a good Federal judge is to always ask yourself, “Am I operating within those limits?”

And so standing is one of the important limits because it ensures that the party who comes before the court has a stake in the outcome. And if we didn't have standing requirements, then courts, instead of deciding cases and controversy, would start deciding issues, and our courts are not set up to decide issues. They decide actual cases and controversy where there is an injury, in fact, or an imminent injury, in fact, and where a judgment would actually have an effect on the litigants before the court.

Senator LEE. And when you are in doubt as to weighing those elements of standing along with the element of whether or not they are fairly traceable to the conduct of the defendants, how would you sort of decide how to balance a close case?

How do you just say whether or not there is standing if you are really on the fence?

Mr. KAYATTA. Right. Let me address the process, because as a practicing attorney, one of the first things I would say is that when a court sua sponte, as us lawyers say, raise something of themselves, I think the court should generally ask the parties to weigh in on the issue.

And sometimes the courts don't do that and I think it's a mistake not to get the benefit of the adversarial process.

Having done that and having looked at the case, I would obviously be bound by the precedent. Having come to the end of the process of reading the precedent, if I didn't know what the decision was, I think I would certainly engage in the process that the chair has suggested of consulting with the other judges on the court, and, ultimately, one has to make a decision.

Senator LEE. You indicated a minute ago that the Federal courts are government bodies with limited jurisdiction. We, too, as a Congress,

we are a legislative body with limited jurisdiction, even though we do not always act like it.

We have exercised a lot of power under the commerce clause of the Constitution. I was wondering if you could tell us what, in your opinion, are the limits on what we can enact under the commerce clause?

Mr. KAYATTA. Well, given the currency of high profile litigation exploring the reach of the commerce clause could——

Senator LEE. And I am not asking you to weigh in on anything pending across the street, sir.

Mr. KAYATTA. Well, I think one starts with the presumption of—I think it's Madison in the Federalist Papers, I think he used the term that the powers of the Federal Government are few and defined. So one starts, I think, with the presumption that for our government to exercise powers, those powers must have their source in the Constitution. In other words, that the people have granted the government that power. So one looks in the Constitution.

Beyond that, you would then look at precedent, and I would be bound by the precedent both of the Supreme Court and of the circuit.

Senator LEE. Is there anything in our precedents beyond what is found in *U.S. v. Lopez* and *U.S. v. Morrison* that is outside of that power? Is there any real limit?

Mr. KAYATTA. Well, those cases discussed certain aspects of the limit. Just knowing how complex the issue of the breadth of Congress' power is, I would be surprised if there weren't other issues that could arise outside the context of those, but I do not profess to be familiar with that.

Senator LEE. I see my time has expired unfortunately. Thank you.

Senator KLOBUCHAR. Thank you very much, Senator Lee.

Senator Grassley has a follow-up.

Senator GRASSLEY. Just one question following-up on something Senator Franken asked you about, the standards that you applied.

I have one follow-up to that.

I would like to have you explain—well, based upon what you said about your respect for rule of law, I presume that applies to respect for standards that you apply for judicial nominees.

Would you mind explaining the standing committee's conclusion in regard to Ms. Kagan's nomination of being well qualified. The conclusion given, its stated standard that judicial nominees should have, "have at least 12 years" experience in the practice of law and, "a substantial courtroom and trial experience as a lawyer or trial judge," considering the fact that Ms. Kagan had spent only a couple years as a lawyer in private practice and did not have the experiences talked about here in the standard.

Mr. KAYATTA. Let me see if I can address that without stepping outside of proper role, because since I'm no longer a member of the standing committee and I've never been authorized to speak on behalf of the committee, other than the particular testimony that was put forth.

But I do have enough familiarity with the standards to know that the trial practice, in particular, which is mentioned in the Committee's backgrounder, is a factor that diminishes the higher one goes.

In other words, it's a very significant factor for a district court nominee; important, but less so, in practice. It was my understanding, if memory serves me correctly. That that was not a requirement for a position on the Supreme Court.

And in that particular incidence, we had the rather extraordinary fact that we had an individual who had served as solicitor general for the United States.

This is a position often referred to as the 10th justice. So it's quite an extraordinary and unusual litigation-related qualification.

Senator KLOBUCHAR. Very good. Well, thank you very much, Mr. Kayatta, and thank you for your testimony, and you are done.

Mr. KAYATTA. Thank you very much.

[The biographical information follows.]

BARBARA KEENAN
WEDNESDAY, OCTOBER 7, 2009
UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Committee met, pursuant to notice, at 4:03 p.m., Room SD-226, The Capitol, Hon. Benjamin L. Cardin, presiding.

Present: Senators Cardin, Specter, Franken, and Sessions.

OPENING STATEMENT OF HON. BENJAMIN L. CARDIN, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator CARDIN. The Judiciary Committee will come to order. Senator Sessions will be joining us shortly and he has asked that we start the hearing. So let me welcome our guests that are with us today.

It is an honor to have Judge Barbara Keenan here, who is a nominee for the U.S. Circuit Court for the Fourth Circuit; Laurie Robinson, for Assistant Attorney General for Office of Justice Programs; and, Ketanji Brown Jackson, for a member of the U.S. Sentencing Commission; and, of course, my two colleagues from Virginia, Senator Webb and Senator Warner. It is a pleasure to have both of you with us today.

I take particular interest in the Fourth Circuit. So I am very pleased today that Senator Leahy has allowed me to chair this hearing on the nomination of Barbara Keenan to the U.S. Circuit Judge for the Fourth Circuit.

This will be the third hearing that I have chaired for nominees in the Fourth Circuit. I had the opportunity to chair the hearing for Justice Steven Agee, who was confirmed to be a U.S. Circuit Judge for the Fourth Circuit from Virginia, and I also chaired the confirmation hearings of Judge Andre Davis of Maryland, who was approved by our Committee 16-3 and we are awaiting full Senate confirmation of his appointment. Unfortunately, that has been delayed several months. And I say unfortunately, because the Fourth Circuit has the highest vacancy rate of any circuit. One-third of the judges still remain unfilled and that is unacceptable and we need to move these appointments much more rapidly.

So I share Senator Leahy's concerns about the delay in the completion of the confirmations of judges. We are backed up now for many that have been recommended by this Committee and there has been a delay by Republican Senators in allowing us to bring forward those nominations on the floor of the U.S. Senate.

I hope that can be changed, because I think it is critically important that we move as quickly as possible to fill these vacancies.

In regards to the Fourth Circuit, we are pleased that Justice Keenan's nomination has come forward. She has served on each of the four levels of the Virginia State court, the General District Court, the Circuit Court, the Court of Appeals and Supreme Court. She was admitted to the State Bar of Virginia in 1974, and she first took the bench at age 29 and it is fitting that she has served as a judge for 29 years.

She has had a balanced career and she has presided over an impressive number of cases. Now, that is a blessing and could also be a concern, because you've had to make some tough decisions,

and there may well be some questions about some of the decisions that you joined either in the majority or in dissent because of the large number.

But you bring a wealth of experience and a great reputation, well known to the people in Virginia, and we are very pleased about your appointment and look forward to this hearing.

Justice Keenan has received the unanimous rating of well qualified from the American Bar Association Standing Committee on the Federal Judiciary, which is the highest rating, and I do look forward to our comments from our two Senators from Virginia.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman. I look forward to hearing from our Virginia Senators and our nominees, look forward to asking some questions.

Thank you and, hopefully, these nominees will meet all the tests and we can move them forward.

Senator CARDIN. Thank you. With that, let me turn to Senator Webb.

PRESENTATION OF BARBARA MILANO KEENAN, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE FOURTH CIRCUIT COURT OF APPEAL BY HON. JIM WEBB, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WEBB. Thank you very much, Mr. Chairman and Ranking Member Sessions. I am privileged to join my colleague from Virginia, Senator Mark Warner, here today for the purpose of introducing

to this Committee Virginia Supreme Court Justice Barbara M. Keenan, whom the President has nominated for a seat on the Fourth Circuit Court of Appeals.

I would like to point out, also, that her husband, Judge Alan Rosenblatt, is with us today, as are a number of friends and family members that I know she will want to introduce.

I would like to thank the Committee for scheduling this hearing. The seat on the fourth circuit that Justice Keenan seeks to fill has been vacant since the death 2 years ago of Judge Emory Widener of Abingdon. It is important to the people of Virginia and to the proper functioning of this court that this vacancy be filled as expeditiously as possible.

Mr. Chairman, I believe that the President has made an extraordinary choice in nominating Justice Keenan. Earlier this year, our two Senate offices interviewed more than two dozen highly qualified candidates for this seat, including distinguished law professors, judges, private practitioners and government attorneys.

And from this very competitive field, Senator Warner and I were drawn to Justice Keenan's record of achievement on the bench, her keen intellect, her even-temperament, and, perhaps most importantly, her abiding sense of fairness.

We recommended her to the President for a nomination in June of this year. I should add that Justice Keenan is held in the highest regard by members of the Commonwealth's legal community, including the Virginia State Bar, which gave her a highly qualified rating. Justice Keenan, as you mentioned, Mr. Chairman, has a distinguished record of service to our courts in Virginia. She was appointed to the Fairfax County General District Court

in 1980 at the age of 29. She was promoted by the General Assembly to the Fairfax County Circuit Court in 1982; to the Intermediate Court of Appeals in 1985; and, finally, to the Supreme Court in 1991.

She is active in numerous boards and commissions intended to foster excellence in our judicial system. Justice Keenan is a 1971 graduate of Cornell University, a 1974 graduate of the George Washington University School of Law, and she also holds an LLM from the University of Virginia School of Law.

I am very, very pleased to be before you today endorsing her nomination. I would now like to invite my colleague, Senator Warner, to offer his comments.

Senator CARDIN. Senator Warner, pleased to hear from you.

PRESENTATION OF BARBARA MILANO KEENAN, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE FOURTH CIRCUIT COURT OF APPEAL BY HON. MARK WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Thank you, Mr. Chairman and Ranking Member Sessions. I join my colleague and good friend, Jim Webb, in wholeheartedly endorsing Justice Keenan for this very important position. I think President Obama made a wise choice in nominating Justice Keenan for this seat on the Fourth Circuit Court of Appeals.

I will not reiterate all of the comments that Senator Webb made about her background. I would simply add a couple of additional comments.

Justice Keenan is the first judge in Virginia's judicial history to serve on all four levels of our bench. As you mentioned in your opening comments, that gives her a broad and wide range of record, 29 years serving in the judiciary.

But I can say that in the process that Senator Webb and I went through, it was a very rigorous process. We had a number of good candidates. I know we have got folks here in the audience, Mitchell Dolan and others, who helped us go through that process.

But Justice Keenan had a remarkable array of people all across Virginia, I believe many of them unsolicited, writing in on her behalf; I would add, members of the legislature from both sides of the aisle who complimented her judicial temperament and her background. She has got an enormously impressive academic record, I would only add, and, clearly, the 29 years on the court, on all four of our courts, has been important, as well.

I would only add, as well, I had the occasion to get to know her a bit personally during my tenure as Governor. We would have every year a dinner between the Governor and our justices of the Supreme Court. With her kind of quiet confidence, she was a leader on that court. She truly reflects, I think, the right intellectual capabilities, the right judicial temperament, and she will be a great addition to the fourth circuit.

I would simply close in adding not only a note of congratulations to Justice Keenan, but I would echo what Senator Webb has said, that we do hope that this nomination will be moved expeditiously. As you well know, Mr. Chairman, the burden on the fourth circuit at this point in terms of the number of open positions and the amount of caseload that confronts that important circuit is tremendous.

This position, as Senator Webb has mentioned, has been open for a couple of years right now.

So we commend her to the Committee's consideration and hope that we will soon be able to address her as Judge Keenan of the Fourth Circuit. Thank you very much.

Senator CARDIN. Just to underscore that one point, there are five vacancies on the fourth circuit. The second circuit has four vacancies. The next are two vacancies. So we are really in serious need of filling these spots.

Let me thank both of our colleagues. Thank you very much.

Senator SESSIONS. Let me just say, one of the things that I think is healthy in this entire judicial nomination process is that key Senators are involved and that your opinions are sought. Some might think that that is unhealthy, but, really, you know the lay of the land in your states and you know if somebody has got problems, and your strong support is a factor in my evaluation, for sure, of a nominee.

Thank you very much for your insight, appreciate it.

Senator CARDIN. Which is the tradition of our Committee, we will use two panels. The first panel will consist of Barbara Keenan to be United States Circuit Judge for the Fourth Circuit.

Judge, if you would come forward. The tradition of our Committee also is to swear the witnesses in.

[Whereupon, the witness was duly sworn.]

Senator CARDIN. Please have a seat. Your entire statement will be made part of the record. What we do ask you to do, first, if you would, is introduce the members of your family that may be here and proceed as you wish.

STATEMENT OF HON. BARBARA MILANO KEENAN, NOMINATED TO BE U.S. CIRCUIT JUDGE FOR THE FOURTH CIRCUIT

Judge KEENAN. [Off microphone.]

Senator CARDIN. Thank you very much. Let me start, if I might, asking questions that have been ones that have been of great interest to our Committee. That is, talk a little bit about your philosophy as to the importance you place on existing precedent, on the clear language of laws that are passed by Congress.

I know that you have been a state court judge, but, if confirmed, you are going to be called upon to make significant rulings concerning Federal issues. In most of these cases, it is going to be the final word. Very few cases, as you know, get accepted to the Supreme Court.

I know this Committee wants to hear your judicial philosophy as to the deference that you will give to laws that are passed by the Congress and to the precedent of the court.

Judge KEENAN. Yes, Senator. As an appeals court judge, if confirmed, I will be most mindful of precedent. That is what guides our legal system. It is our obligation as judges to apply the law and, if at all possible, to apply the plain meaning——

Senator CARDIN. I am going to ask you, if you could, just get the microphone a little closer to you.

Judge KEENAN. I am sorry. I do not do this every day. I am sorry, sir. I would be most mindful of precedent. It is what guides me as a judge and has always guided me as a judge, because our system of government is based on the certainty and predictability

of the law and this guides people in their everyday affairs in order to determine what is lawful and what is not.

So as a judge, I am required to examine the precedent, examine the statutes, whenever possible, to apply the plain meaning of the statutes and to realize that it is my role to apply the law and to do it in a manner that gives full and fair consideration to all of the arguments propounded by the parties.

Senator CARDIN. In 2000, you ruled in a Virginia human rights case, expanding the ability of a person to bring a claim for employment discrimination. I agree with your holding, but it was contrary to the prior rulings, as I understand it.

I mention that because I do believe—one of my criteria for determining who I support on confirmation to the Federal bench is their passion and respect for the protections that are in our Constitution and their willingness to understand the evolution of the rights in this country.

But could you just go through for me and for the Committee why you thought it was important to ignore precedent in that case?

Judge KEENAN. Well, sir, it was not ignoring precedent. Really, the issue had come up as to whether a cause of action for wrongful termination for employment would lie. Under common law principles, when these principles were also principles covered by the Virginia Human Rights Act, and the Virginia General Assembly had, after the Virginia Human Rights Act had been on the books for a few years, had amended the statute to say that the statute did not create an independent cause of action.

And so the question before our court was to determine whether, if there was a cause of action under the common law, could it nevertheless be made, notwithstanding the statutory bar. And this was a question of first impression really in our court and the majority of the court held yes in the opinion that I wrote.

And the reason why is if we hadn't done that, then the fact that there was a principle in the Human Rights Act, for example, a principle supporting racial equality or gender, antidiscrimination based on gender, would provide an employer a shield. An employer could do anything he or she wanted as long as it was the principle of equality espoused in the Virginia Human Rights Act.

That could be used as a shield and that's the reason why we felt that it was important to decide the case the way we did.

Senator CARDIN. I am going to have some additional questions on this point. But at this point, with the consent of Senator Sessions, I am going to yield to Senator Specter for the purposes of an introduction.

Senator CARDIN. Well, let me wait until the next round. I will let you proceed, because I want to go into a couple of different areas. So I will hold for a second round.

Senator SESSIONS. Mr. Chairman, Chairman Leahy and others, I would like to start a preemptive complaint about failure to move judges. We have really not had a problem yet, in my view. There are two or three that are controversial. But I would note that there are 74 vacancies as of October 7 and the President has nominated nine for the district court bench.

So we cannot confirm people for vacancies if they do not have a nomination and when a nominee is made, then the staffs review their backgrounds and their FBI reports and share that with the

Senators. If there is any problem, they are looked at. Usually, prominent lawyers and people are checked on. We get the ABA report. Cases appear sometimes that cause people concern and they are inquired into.

But I am committed to moving the good nominees rapidly forward. It does not bother me that a nominee is a Democrat or has been elected as a Democrat or been active politically. That does not bother me. We just like to see nominees that know when they put on the robe, something special occurs and that they are no longer in the political arena, they are in the adjudication arena, and objectivity and fairness to all parties is what is called for.

A few of the nominees that are nominated now and that are pending probably are going to be a bit controversial, but I would expect the overwhelming number of these nominees to move forward. And some of those that are not controversial now, for reasons I do not know, I understand, are not being called up for vote, and they would be promptly confirmed if the majority leader called them up.

Justice Keenan, it is great to have you. You have a background certainly worthy of this position and it is good to see your Senators are firmly in support of your nomination and we are proud of that. I would just ask a few questions. I do not mean to suggest that I think that you have failed in some serious way, but I would just like to ask some questions about some matters.

At a commencement at William and Mary Law School in 1998, you stated that lawyers have made contributions to the progress of social justice. The contributions that we each make to the cause of social justice will be our true legacy as lawyers. I think I agree with that most totally, but I want to ask whether you meant that your role as a judge—you said lawyers, you did not say judges—that it is your duty as a judge to seek, affirmatively, I guess, to promote social justice.

Now, the reason that is significant, of course, is whose opinion of social justice and to what extent do you believe a judge should be thinking of policy matters as they render their opinions in difficult cases?

Did I ask that clearly? Not very clearly.

Judge KEENAN. No. You did. Thank you, Senator.

Senator SESSIONS. If I were before the bench, you would probably ask me to clarify the question.

Judge KEENAN. Not at all. I was—when I made that speech, I was talking to young lawyers beginning to enter the legal profession and in coining the—or in using the term “social justice,” I was referring to lawyers’ duty to work within the system of laws to protect people, to protect society, and to make strides for the general good of all.

A judge’s role is very different, however. A judge is not an advocate and never can be. A judge is not an activist. A judge is somebody who comes with an open mind to listen to the arguments put forth, consults precedent, examines the law, makes a determination based on what the parties have advanced, whether there is any merit to the position, and then writes, very clearly and precisely, if the judge’s goal is met, to apply the precedent that exists in a given situation.

And so a judge's role is very different from that of a young lawyer. Senator SESSIONS. Well, I think that you are right. I think there is a difference. And I do think lawyers have responsibility to, if they think injustice is occurring and a party is not able to always pay full fee, that they should be prepared on occasion to step up and serve the higher good. You make a valid point there and I think with regard to a judge, objectivity, as you stated, is important. I think one of the biggest difficulties we face in the legal system is confusion over the establishment clause. We just had a marvelous ceremony, I was so proud to be there, to replace one of the statutes that Alabama had in Statuary Hall with a statue of Helen Keller, who perhaps did more than any single person in history to help the disabled.

It began with a prayer delivered by the chaplain of the House of Representatives and it concluded with a prayer by the chaplain of the U.S. Senate. So at any rate, I think the Supreme Court has failed to clarify what it is that is OK and what is not OK or what is permissible and not.

In *Virginia College Building Authority v. Lynn*, the Virginia Supreme Court considered that Regent University, a sectarian private school in Virginia, could participate in a state-run bond program. I guess it was a bond program that colleges and universities, private and public, could participate in.

You joined another justice's dissent that would have held that the university, since the university provided "religious training or theological education," closed quote, in violation of the Virginia Constitution and state statute, it would be a violation of Virginia Constitution and state statute to allow them to participate in that program, even though the university taught secular subjects, also. Although your opinion did not directly address whether it would violate the establishment clause to allow Regent to participate in a bond program, I am concerned about your view on the separation of church and state issues.

At the time you decided this case, did other religious schools in Virginia, for example, private or parochial schools, participate in the program and if so, what made Regent different from those schools?

Judge KEENAN. Well, as I recall, Senator, that bond issue came in the context of the proposed Regent campus that was going to be for a divinity program. So that while Regent had other nonsectarian programs, such as business and law, that the bond funding was going to be used directly for that school of divinity, and that's what made a difference, in my mind, in the analysis that was applied.

We did not have an establishment clause argument. It was simply whether there was that sectarian—whether there was that overlap in terms of the bond funding and the religious purpose of the construction that was proposed.

Senator SESSIONS. Well, I would acknowledge that we have got quite a body of law that is pretty amorphous about how to decide these issues. But the Constitution prohibits establishment of a religion, but it guarantees the right to free exercise of religion. Presumably, being a minister of a religious faith is not in itself a bad thing.

Therefore, I am going to—I will just ask you to perhaps see if you can explain why it is that you would care whether they wanted to study to be a minister.

Judge KEENAN. I think it was great that they wanted to study to be a minister, I mean, certainly, but——

Senator SESSIONS. Well, why would that disqualify—why is that profession different than being a consiglieri for the mafia? They could get money if you were going to——

Judge KEENAN. Well, the issue, though, was the bond funding and whether the bonds were being used for a religious purpose and under our law, the bonds could not be used for a religious purpose, and that was——

Senator SESSIONS. Was that the State Constitution or State statute; do you recall?

Judge KEENAN. I believe it was brought under the—there was a constitutional challenge and I don't recall any particular statute, I have to say, because——

Senator SESSIONS. The State's Constitution or Federal?

Judge KEENAN. I believe it was State. But because of the passage of time, sir, I could stand corrected.

Senator SESSIONS. Well, there are difficult issues. It just seems to me that we all exercise, if somebody wants to undertake a religious career and actually counsel people on their marriages and go through their funerals with the families and help raise their children and good and healthy values, somehow that becomes unconstitutional and that other goals are not.

Thank you, Mr. Chairman.

Senator CARDIN. Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman. Welcome, Justice Keenan. That is proper, right?

Judge KEENAN. Thank you.

Senator FRANKEN. I would like to welcome your family, as well. And I agree that mafia consiglieri schools should not get funding.

[Laughter.]

Senator SESSIONS. Well, they would be able to go to New York demand it and get it.

Senator FRANKEN. Well, OK. We cannot even agree on that. This morning, we had a hearing called Workplace Fairness: Has the Supreme Court Been Misinterpreting Laws Designed to Protect American Workers from Discrimination, and Jack Gross, who was one of the witnesses, testified from the Gross v. FBL Financial Services case.

I am interested to learn more about your rulings in discrimination cases. In Shaw v. Titan Corp., you ruled that a plaintiff is not required to prove that his or her employer's discriminatory motive was the sole cause of termination.

Now, in Gross, the Supreme Court recently ruled on this very question and they determined that lawsuits under the Age Discrimination in Employment Act, that in lawsuits under that, that the plaintiff must show that age was the determinative factor in the termination.

I found this to be troubling and sort of thought of it as judicial activism. Can you tell me your reasoning in deciding the Shaw case, what led to your decision, and what you think of the Supreme

Court's decision on Gross, which, of course, you would certainly abide by the precedence of that, since this is for the fourth circuit? Judge KEENAN. Thank you, sir. First of all, of course, the United States Supreme Court precedent binds us all.

Senator FRANKEN. Right.

Judge KEENAN. And the statute that they interpreted, that issue is settled and beyond dispute. The Shaw case came up in the context of a wrongful termination of employment. It was, as I recall, a common law claim and the question was the plaintiff, as you say, required to prove that the employer's sole motive was the discriminatory motive.

And our court unanimously determined that the plaintiff was not so required and the reason for that was that in these situations, there are often after-the-fact reasons given. There are a myriad of reasons that come to the fore and we felt that this was an issue for the trier of fact. This is something for the jury to sort out. Was this a reason why this person was fired as opposed to was it the only reason why this person was fired? There could be many justifications for firing, many gradations, perhaps the most serious being the discriminatory act of the employer and there being some subsidiary considerations that were really quite minimal in comparison.

And so the trier of fact could make that determination.

Senator FRANKEN. Is the burden on the plaintiff in that case to show that the preponderance of the cause of being fired was a discriminatory motive?

Judge KEENAN. No. That by the preponderance—under the Shaw ruling, it would be that by a preponderance of the evidence, my employer fired me for a discriminatory reason. And then the employer could, by defense, come back and say, "Wait a minute. This was very, very minimal in our determination. This employee didn't show up for work on time. This employee was disloyal, leaked information to a competitor," and all sorts of a host of reasons that would be available to an employer for a defense.

Senator FRANKEN. Right. But you felt that—I mean, what you ruled was it does not have to be the sole reason, the discrimination.

Judge KEENAN. That's right. Yes, sir.

Senator FRANKEN. Thank you. Thank you, and welcome to your family again.

Judge KEENAN. Thank you, sir.

Senator CARDIN. Justice Keenan, let me just comment on one of your roles I found important and that is the removal of a district court judge, which is something that is rather unpleasant. No one likes to be involved in that.

But I want to give you an opportunity to talk a little bit about how important judicial ethics is in your life as a judge and, if you are confirmed to the Federal bench, how you see your role as far as ethics is concerned.

Judge KEENAN. Yes, Senator Cardin. I think that judges serve a very important role in terms of in their communities, in terms of always standing for the highest ethical principles.

The case to which you allude was a very difficult case for our court. A judge, as you're aware, actually had—a woman was claiming that she was injured or attacked by her husband and the judge made a very, very poor decision in terms of asking the woman to

lower her pants in the courtroom to display her wound.

And although this was a restricted hearing, because it was a domestic relations court, there were still several members to whom this woman was not related who saw her exposed body. As a court reviewing this, we took the matter very seriously, because we considered, in terms of the community, what would it say if we sent that judge back to the community having done this, having, from my perspective, ignored the dignity of the individual who was before the court.

This woman was coming before the court with a complaint. She was seeking the aid of the court and, in our view, she was degraded—she was degraded by that judge. We felt that it would be a very, very unwise course to return that judge to the bench in view of the extreme nature of his conduct and misjudgment.

Senator CARDIN. Well, thank you for that answer. It is a tough decision to remove a colleague and it was the right decision.

The oath that you will take if confirmed includes the provision of doing justice regardless of wealth, specifically mentioning the poor. I personally believe the legal community has a specific responsibility as it relates to providing access to justice to those who otherwise could not afford it, including pro bono work.

I want to hear what you have done during your career in regards to meeting this obligation of pro bono and how you see your role as a judge in furthering access to those who otherwise would not have access to our legal system.

Judge KEENAN. Thank you, Senator. I think the judge is a very important role model in terms of the legal community, in encouraging lawyers to perform pro bono work.

As an attorney, I regularly accepted reduced fee civil cases from the Fairfax Bar Association. I accepted criminal court appointed cases and I worked on many bar committees and did volunteer work for several years when I practiced as an attorney.

And then when I became a judge, I felt it was very important to continue this work and I did it at different—in very different aspects of the community. In one case, I worked as a volunteer mentor for a year in an elementary school, where once a week I met with a student and she and I went over her homework, talked about the law. I tried to give her hope for the future.

She lived with, I think it was, six siblings in a one-bedroom apartment with her mother and her grandmother, and it was a one-on-one relationship to try to give this young girl some hope.

I've worked in much larger group programs with the YMCA to encourage young students with regard to careers in the law, to excite them and interest them. I love speaking in public schools. I have done that quite a bit. My favorite grades are four, five and six, because the kids are still lacking in cynicism and they just love to learn everything they can.

I am now currently working on a judicial wellness initiative with the Supreme Court of Virginia and that is something I regard as very, very important to our state, and that is to help judges and their families who are having substance abuse problems. They also could be having bereavement problems, problems involving depression, problems that a judge normally can't get help for in a community because of the judge's leadership role.

So I have devoted a big part of my career to pro bono work.

With regard to the second part of your question, the courtroom and the court process and what we do for litigants, I think a court has to be zealous in making sure that litigants have all of the rights that they're entitled to.

In other words, if a defendant is asking for an attorney, as a trial judge, I always made sure that defendant got the attorney. When the defendant was making a motion under *Ake v. Oklahoma* for an investigator or whatever, I, of course, wanted to make sure that his or her plea was fully and fairly heard.

A judge has a boundary, though, that the judge cannot step over. I cannot subjectively cross over and actively try to rebalance the scales because I think somebody may have fewer resources in the legal system. I will zealously ensure that they get everything that is available and that they're entitled to, but I don't believe it's my role to, as I said, attempt to rebalance the scales, because then I become a player in the process rather than a neutral evaluator of the case before me.

Senator CARDIN. And I do believe that there have been some court decisions on that, as well, defining that role the way you just stated. So I agree with that.

In normal times, it is difficult for poor people to get access to our civil system. In a recession, it is that much more difficult. Our highest court in Maryland has passed rules underscoring the responsibilities of every member of the bar to participate in pro bono activities and having mandatory reporting as to what our lawyers are doing in regards to meeting that obligation.

I do not know whether the Supreme Court of Virginia has taken any similar steps or not. I do know that the different circuits do talk about these issues. I just want to get your interest and using your position appropriately in the leadership of the judiciary to advance what I hope you agree with me is a responsibility that all lawyers have to participate in pro bono and to help particularly in tough economic times.

Judge KEENAN. I certainly agree, Senator, that there is a great need, there is an enormous need out there, and I think that a judge—all judges should encourage lawyers to engage in this kind of work.

And it doesn't mean that a lawyer has to do one type of pro bono work over another. There is a myriad of options available to attorneys so that they can find what suits them best, suits their interests and their personal beliefs.

And I don't think that a judge should advocate for any one particular program over another, but a judge should urge lawyers to give of themselves and to give back to the community that's really given them a lot.

And so that's something I've done throughout my career and that's something I would anticipate, if confirmed, that I would take pleasure in doing on the Federal appeals bench.

Senator CARDIN. Thank you for that answer. Senator Sessions.

Senator SESSIONS. Thank you. Judge Keenan, I guess you know fairly closely what you get paid. Are you willing to serve at that salary?

[Laughter.]

Judge KEENAN. Yes, sir.

Senator SESSIONS. I asked John Roberts that, Chief Justice Roberts, he took a little longer to answer it and he has since asked for more.

[Laughter.]

Senator SESSIONS. But with the deficit we are facing, I do not think we are likely to see any huge increases. And everybody would like to be paid more, but this country is in serious financial condition. Tell me about, just briefly, on your caseload, how would you estimate the caseload of the fourth circuit to be compared to your caseload on the Supreme Court that you serve now.

I know we have a shortage of judges, probably more in the fourth circuit than any other circuit. Some of that is due to objections from Senators from the fourth circuit to President Bush's nominees, rightly or wrongly, but some of them did not get confirmed.

I will just say it that way.

But how do you feel about that? We just had a hearing last week, I guess, in which Judge Tjoflat of the eleventh circuit, I think, has the highest caseload in the country, believed that they should not add more judges because the circuit becomes more unwieldy, and some of the other circuits were requesting judges when they had substantially less.

So I guess, at any rate, do you feel a responsibility to manage cases and how do you compare the level you expect to see in the Federal court as compared to what you had to do on the Supreme Court?

Judge KEENAN. Well, I think that the biggest difference probably is the Supreme Court of Virginia, most cases do not have appeals of right. They proceed on a petition for appeal, and in the Federal court, there is the right of appeal. And so that certainly admits of the possibility of a lot more cases.

In Virginia, we handle, I think, about 3,000 cases a year in our Supreme Court and we work very hard and——

Senator SESSIONS. You write opinions on how many?

Judge KEENAN. No. We write opinions not on that many, no. We issue orders in many cases. This is an estimate, but we issue somewhere around 250 opinions, I think, a year.

I believe that the—and, see, with regard to the fourth circuit, I'm not familiar with their internal statistics, but they do issue a number of opinions and then some of them nonpublished, some of them published.

So I'm not really familiar with the numbers, but I do sense that I'm going from one pretty demanding job to another and I have to say I'm looking forward to the challenge. I like to work.

Senator SESSIONS. Well, you have got a record that has won the respect of quite a lot of people and that is something you can be proud of and I know you are pleased to have the honor of this nomination. We will maybe submit a few more questions to you, but I appreciate the opportunity to meet you and talk with you today.

Judge KEENAN. Thank you, sir.

Senator CARDIN. Thank you, Senator Sessions. Let me point out, the record will remain open for questions by members of the Committee. I would urge all the nominees to try to get those responses back as quickly as possible and as thoroughly as possible. It will

expedite the ability of the Committee to move the matter forward.
So we would just urge you to give that your prompt and complete
attention.

Judge, thank you very much, appreciate it.

Judge KEENAN. Thank you, sir. Thank you, Senator.

GOODWIN LIU
FRIDAY, APRIL 16, 2010
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:04 a.m., Room SD-226, Dirksen Senate Office Building, Hon. Dianne Feinstein presiding. Present: Senators Leahy, Klobuchar, Kaufman, Specter, Sessions, Hatch, Kyl, Cornyn, and Coburn.

OPENING STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Welcome, everyone, to this morning's hearing of the Senate Judiciary Committee.

This morning we will hear from five nominees for the Federal courts, two of whom hail from the State of California.

We've just been joined by the Chairman. Mr. Chairman, do you want to—

Chairman LEAHY. No, no. Please go ahead and chair the hearing. Senator FEINSTEIN. Okay.

We will hear from five nominees for the Federal courts, two of whom hail from the State of California.

On the first panel, we will hear from Professor Goodwin Liu, who has been nominated for a seat on the U.S. Court of Appeals for the Ninth Circuit. Professor Liu is a nationally recognized expert on constitutional law and education policy and he is the Associate Dean of the University of California, Berkeley, Bolt Hall School of Law.

Before I give some brief remarks as also the Senator from California about Professor Liu, I would like to just quickly go over the order of this hearing. There will be 5-minute rounds. We will use the early bird rule and we will go from side to side.

Following my statement, the Ranking Member will give his opening statement. Of course, the Chairman of the Committee is here and if he wishes to make a statement he will do so.

Then I will introduce a series of letters into the record, and then we will call up Professor Liu.

So let me say a few words about Professor Liu now. He was born in Augusta, Georgia, raised by his parents, who were here, who were Taiwanese doctors that had been recruited to the United States to provide medical care in under-served areas. Professor Liu's parents left Taiwan when the country was still under martial law, and they imbued in him a deep respect and appreciation for the opportunities afforded in the United States.

Professor Liu did not learn to speak English until kindergarten because his parents did not want him to speak with an accent, and from that early age on he has excelled again and again: he was co-valedictorian of his high school; he graduated Phi Beta Kappa from Stanford University, where he was co-president of the student body and received the university's highest award for service as an undergraduate.

I have never before received a letter about a judge which was signed by three different presidents of a university. I want to read some of it to you because I think it's important.

Goodwin Liu attended Stanford while Donald Kennedy was

president. He graduated Phi Beta Kappa in 1991. He was the recipient of numerous awards for his academic excellence, leadership, and contributions to the university, including the Lloyd W. Dinkelspiel Award for Outstanding Service to Undergraduate Education, the James W. Lyons Dean's Award for Service, the Booth prize for Excellence in Writing, the Walter Vincenti prize, a David Starr Jordan Scholar, and the university's President's Award for Academic Excellence.

Dr. Kennedy worked with Goodwin Liu when he was one of the early student volunteers and leaders for the Haas Center for Public Service at Stanford while he was co-president of the student body his senior year. In 1990, Donald Kennedy wrote a personal letter, recommending Mr. Liu for the Rhodes scholarship, which he won and used to obtain a master's degree at Oxford University.

Gerhart Casper, president emeritus of Stanford and former dean of the Law School and provost at the University of Chicago, is now a constitutional law scholar at Stanford. Dr. Casper has come to know Mr. Liu as a Stanford alumnus, and then as a colleague in constitutional law. He considers Mr. Liu as a measured interpreter of the Constitution.

“In expounding the Constitution, Mr. Liu fully appreciates the commitments of the framers, who were decisive in fidelity to the Constitution and its interpretation by the Supreme Court. Mr. Liu will be a distinguished and faithful addition to the appellate branch.”

Goodwin Liu is currently a member of the board of trustees of Stanford University, the governing body for the university. John Hennessy has worked closely with him since his appointment as a trustee in 2008. “Mr. Liu is an invaluable member of the board, serving on the Committees on Audit and Compliance, Academic Policy, Planning and Management, and Alumni and External Affairs. In a group of highly accomplished trustees, he is widely regarded as insightful, hardworking, collegial, and of the highest ethical standards.

In summary, Goodwin Liu, as a student, scholar and trustee, has epitomized the goal of Stanford's founders, which was to promote the public welfare by exercising an influence on behalf of humanity and civilization, teaching the blessings of liberty, regulated by law, and inculcating love and reverence for the great principles of government as derived from the inalienable rights of man to life, liberty, and the pursuit of happiness. We highly recommend Goodwin Liu for the honor and responsibility of serving on the U.S. Court of Appeals for the Ninth Circuit.”

The letter is signed, “John L. Hennessy, President, Gearhart Casper, President Emeritus, and Donald Kennedy, President Emeritus. Additionally, Professor Liu began his legal career as a law clerk to two highly accomplished jurists. One jurist on the U.S. Court of Appeals for the D.C. Circuit, and Justice Ruth Bader Ginsburg, on the U.S. Supreme Court. He has also worked as a special assistant in the Department of Education. He has represented business clients in antitrust and insurance cases as a private litigator at the law firm of O'Melveny & Myers.

In 2003, he became professor at Boalt Hall School of Law. His scholarly work has been published in the Nation's top journals. In

2009, he received the university's Distinguished Teaching Award, the highest honor given for teaching at the University of California at Berkeley.

Throughout his career, he has devoted particular care and attention to improving educational opportunities for students in the United States. He is a supporter of voucher programs and charter schools. He serves as a consultant to the San Francisco unified school district, and he has been awarded the Education Law Association's award for Distinguished Scholarship. He has an exceptional legal mind and a deep devotion to excellence in public service.

So now, before I mention the other individuals, I would like to turn to the Ranking Member for his remarks and any remarks he'd care to make about this nominee, and then we will proceed.

PRESENTATION OF GOODWIN LIU, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT BY HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Madam Chairwoman. We appreciate being with you. I'm glad Senator Leahy can join us. I look forward to the nominees today. I see my Congressional colleagues. I know they're ready to say something. They've got things they need to do today.

But I do want to say a few things. I love this Constitution, the great republic that we've been given. It is something that we should cherish and pass on to our children. In the nomination of Professor Liu, we have someone that I know you have recently spent a number of hours with and have a high opinion of. Others who know him speak highly of him.

Professor Liu has written broadly on many of the important issues concerning law today. Many people respect his writings, and many people disagree with his writings. They represent, I think, the very vanguard of what I would call intellectual judicial activism, a theory of interpretation of our Constitution and laws that empowers a judge to expand government and to find rights there that often have never been found before.

So I think this is going to provide an interesting discussion for us today. The President, out of all the fine lawyers and professors in the country and in the Ninth Circuit, has chosen Professor Liu. I think that says something about his approach to the law, his philosophy of the law, and we'll be looking into that today. I'll be asking questions about a number of things.

There are many, many things that the Professor has written, but one in his Stanford Law Review article of November, 2008, "Rethinking Constitutional Welfare Rights" states this: "My thesis is that the legitimacy of judicial recognition of welfare rights depends on socially situated modes of reasoning that appeal not to transcendent moral principles of an ideal society, but to the culturally and historically contingent meanings of social goods in our own society."

He goes on to say, "I argue that the judicial recognition of welfare rights is best conceived as an act of interpreting the shared understanding of particular welfare goods as they are manifested in our institution, laws, and evolving practices", and goes on to state, "so conceived, justiciable welfare rights reflect the contingent character of our society's collective judgments rather than the tidy logic of comprehensive moral theory."

Well, I think that's a matter that we should talk about and to deal with honestly and fairly today, and I hope that we will be able to do that. I believe Professor Van Alsteen, then at Duke—I think he's at the Eleventh Circuit Conference, made remarks one time that "if you truly respect the Constitution you will enforce it as written, whether you like it or not." I think that's the calling of a judge. They're not empowered to identify somehow in the atmosphere what they consider to be socially altered opinions of the day and then redefine the meaning of the Constitution.

If you feel, and if a judge feels they have that power, and this is a theory that is afoot in America today, judges who feel they have that power, I think, abuse the Constitution, disrespect the Constitution, and if it's too deeply held, can actually disqualify them for sitting on the bench.

I would note that Professor Liu understands, I think, the importance of judicial philosophy in the confirmation process when he opposed Justice Roberts' confirmation. He issued a statement that said, "It's fair and essential to ask how a nominee"—Judge Roberts—"would interpret the Constitution and its basic values. Americans deserve real answers to this question and it should be a central focus of the confirmation process."

He concluded that I guess his disagreements with Justice Roberts on that issue was so severe, that he advocated him not being confirmed in the Senate, as well as he testified in this Committee to very aggressively—too aggressively, I think—oppose the confirmation of Justice Alito.

So, Madam Chairman, we've got a number of issues we want to talk about. I want to give the nominee a chance to respond fairly to the concerns of his failure to produce certain documents and records and so forth. He's entitled to that. I do believe that he did not spend nearly enough time in evaluating the questionnaire and properly responding to it to a degree that I've not seen, I think, since I've been in the Senate.

And I'll also note that the nominee has not been in court and tried cases. He's never tried a case, never argued a case on appeal, and therefore lacks the normal experience we look for. He has an academic record, and that's all we have to judge his judicial philosophy on. We intend to pursue that, and I hope we'll have a good hearing and a nice discussion about the future of law in America.

Senator FEINSTEIN. Thank you very much, Senator. We will have a good hearing, and appreciate all members having an open mind. I'd like to ask the Chairman of the Committee if he has any comment to make before we proceed further.

Senator.

PRESENTATION OF GOODWIN LIU, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT BY HON. PATRICK J.

LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. I'll put my full statement in the record. I thank you for doing this hearing. I know this is the third time we've had it scheduled, and I'm glad this time the parliamentary—there wasn't a parliamentary road block up to prevent hearing from him. Professor Liu is a widely respected constitutional law professor. I noticed one of the Fox News commentators said his qualifications for the appellate bench are unassailable.

When I listened to some of the concerns expressed by them, I hate to suggest a double standard here, but I will. I think of when another widely regarded law professor appeared before this Committee as a nominee, the University of Utah professor, Michael McConnell, who was also supported by a senior member of this Committee, Senator Hatch.

Professor McConnell was nominated by President Bush. He had had provocative writings. They included staunch advocacy for reexamining the First Amendment free exercise clause and the establishment clause jurisprudence. He expressed strong opposition to *Roe v. Wade*. He had testified before Congress that he believed the Violence Against Women Act was unconstitutional, an act that both you, Madam Chair, and I had worked on and helped write, and had been passed by a bipartisan majority.

He had a number of other areas where he was strongly critical of the Supreme Court. But he said that he felt that he believed in the doctrine of *stare decisis*, he'd be bound to follow Supreme Court precedent. I supported, even though I disagreed with just about everything that he had written about. I believed it when he said that he would follow Supreme Court precedent.

I supported his nomination, and unlike now when even people come out of here unanimously and are held up month after month, week after week, he was reported favorably by this Committee and was confirmed to the Tenth Circuit by a voice vote. I'd just note this for Senator Sessions, if I might: he was reported by voice vote in the Senate within a day of his nomination being reported. Within a day. We now have people, even for the lower courts, who get unanimous and we have to file cloture to even get them through. So I'll put my full statement in the record, Madam Chair, and I thank you.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

Senator SESSIONS. If I could just respond, since my name was mentioned. I would note that this nominee, Professor Liu, was set for a hearing in 28 days, when the average Court of Appeals nominee for the Obama administration so far was 48 days, and during the time when President Bush was in office the average time wait between nomination and a hearing when Senator Leahy was Chairman was 247 days.

So, I think we're moving rapidly, a little more rapidly than all the members on our side felt we should. Since as late as Tuesday night at 10:30, we're still receiving documents that should have been produced earlier that are just now being produced. So I think that this nomination is moving very fast, and we'll do our best to be prepared, although it's difficult, with a short timeframe, to evaluate the large numbers of documents, 117, that have been produced since the first hearing was set.

Senator FEINSTEIN. Thank you. Thank you.

Chairman LEAHY. I would note on that, having been mentioned—we don't have to go back and forth on this—but within about 3 weeks of the time I became Chairman of this Committee I scheduled and held hearings on one of President Bush's Court of Appeals nominees. I think it was within two or 3 weeks of becoming Chairman. That's not quite 280 days. Thank you.

Senator FEINSTEIN. Yes. I hope we don't get into a discussion of this.

[Laughter.]

Senator FEINSTEIN. But I feel I should point out that this hearing has already been delayed twice. Chairman Leahy originally intended to hold the hearing on March 10. That was 37 days ago. At the Ranking Member's request, he delayed it to March 24, but the minority then used a procedural tactic on the floor to block the hearing.

In the meantime, Professor Liu has been attacked and really never given a chance to speak. That's simply not fair and it's certainly not the American way. I won't go into a lot of judicial confirmation statistics, but I will say that in the first 15 months of the Obama administration, only 18 judicial nominees have been confirmed. By the same time in the Bush administration, 42 nominees had been confirmed.

Senator SPECTER. Madam Chair.

Senator FEINSTEIN. Senator.

Senator SPECTER. I wonder if I might be recognized for just a minute. I have to catch a train, but I wanted to make a very brief comment.

Senator FEINSTEIN. You certainly may. And I assume—I know Representative Clyburn had said he had a problem with time. Is that agreeable with everybody? Fine. Please go ahead.

PRESENTATION OF GOODWIN LIU, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT BY HON. ARLEN

SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. I will be very brief. I wanted to stop by today to urge my colleagues to move with dispatch on the nomination of Goodwin Liu. It is my hope that we will find one day soon an opportunity to break the gridlock which has engulfed the Senate for some time now on the judicial issues. We had the filibuster on the other side in 2005, and we finally worked through it with the so-called Gang of 14, where we solved the problem: no filibusters except under unusual circumstances.

I have reviewed Mr. Liu's record and I see that he's a Yale Law School graduate, was on the Yale Law Journal. With some personal experience on those credentials, that's an extraordinary background, plus all the rest of——

Senator FEINSTEIN. You leave out Stanford.

[Laughter.]

Senator FEINSTEIN. Never mind.

Senator SPECTER. Plus all the rest. Well, he's got a good supplemental record to draw distinction.

But we really need the best and the brightest in these positions. The business about the filibusters is being carried to just ridiculous extremes.

Senator Casey and I have Judge Vanaskie, a District Court judge, who is extraordinary. We had to file a petition for cloture, it takes 30 hours of the Senate's time. So many cloture petitions have been filed and they have then been confirmed unanimously, or virtually unanimously.

So I think there really has to be some break point where we stop the retaliation. If it takes another Gang of 14, or perhaps more

happily a Gang of 100, to get it done, I would urge my colleagues to move ahead here.

But I wanted to come by for a few moments. I appreciate you taking me out of order, Madam Chair, and I appreciate the indulgence of my colleagues.

Senator FEINSTEIN. Thank you very much, Senator.

I would also submit at this time Senator Boxer's statement. She regrets she is unable to be here and has asked me to submit her statement for the record in support of California nominees, Professor Goodwin Liu and Magistrate Judge Kimberly Mueller.

I'd also like to recognize members of the House of Representatives here today, Representative Mike Honda, Representative Doris Matsui, and Representative David Wu, who are here today. Also, Representative Gregorio Sablan, we very much welcome you. So, thank you very much.

Now, Mr. Liu, would you please come forward? If you would introduce your parents and your family at this time, then I'll administer the oath.

STATEMENT OF GOODWIN LIU, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Professor LIU. Thank you so much, Madam Chair.

I'm delighted to be able to introduce my family today. With me from California, sitting in green behind me, is my wife, Ann O'Leary. She's a native of Orono, Maine. Her parents, Pam and Charlie, couldn't be here with us, but I'd like to introduce them as well.

In Ann's arms is my 4-week-old son Emmett, who I hope, Madam Chair, you will give special dispensation to sleep through this hearing.

[Laughter.]

Senator FEINSTEIN. Better asleep than the other end of the spectrum.

Professor LIU. I think we'll all be better off for it.

Senator FEINSTEIN. Yes.

Professor LIU. And then sitting next to my wife is the apple of our eye, that's my daughter Violet. She's 3 years old. It turns out that she and Emmett share the same birthday. My wife and I have been trying to explain to her that I've been nominated to be a judge, and about 3 days after my nomination she said to me, "Daddy, are you a judge yet?"

[Laughter.]

Professor LIU. I said, "Well, that's not the way this works." But she became so interested in the constitutional process of advice and consent that she decided to join us here today.

Senator FEINSTEIN. Right.

[Laughter.]

Professor LIU. Sitting in the row right behind are my parents, Wen-Pen and Yang-Ching Liu. They go by their initials, WP and YC. They came here all the way from Sacramento, California, where they live, to support me.

I have a brother as well, Kingsway Liu, who also lives in the Bay area. He's a doctor and couldn't get a day off today to be here, but I also wanted to introduce him for the record.

And behind me is a large number of my former students and friends, and I would just like to recognize them and the special efforts that they made to be here to support me.

I don't have any further statement, Senator. I'm happy to answer the Committee's questions.

Senator FEINSTEIN. Well, thank you very much.

If you would stand and raise your right hand, please.

[Whereupon, the witness was duly sworn.]

Senator FEINSTEIN. Thank you very much.

Chairman LEAHY. Madam Chair, if I could just interject.

Senator FEINSTEIN. Mr. Chairman.

Chairman LEAHY. Seeing the children there, Professor Liu, you should know, the folks on this Committee are constantly inundated and having to see pictures of my grandchildren, so I'm delighted to see your children, one of whom is roughly the age of one of our grandchildren. They're beautiful children.

Professor LIU. Thank you very much, Senator.

Senator FEINSTEIN. Professor Liu, if you would please proceed and make a brief statement to the Committee, and then we will open the dais for questions.

Professor LIU. Madam Chair, I have no opening statement. I would be happy to proceed with answering the Committee's questions.

Senator FEINSTEIN. My goodness. That's very unusual. All right.

Well, let me begin then. In a letter yesterday, Ranking Member Sessions wrote the following about your supplemental responses to your questionnaire: "There is now a serious question as to whether Professor Liu has approached this process with the degree of candor and respect required of nominees who come before the Committee. We can no longer extend him the benefit of the doubt that these substantial omissions, in which several of his more extreme statements appear, were a mere oversight."

I would like you to tell the Committee, if you will, what process did you use to provide materials to the Committee, and how were these supplemental materials overlooked, and were they provided?

Professor LIU. Thank you, Madam Chair, for the question. I'm happy to have an opportunity to address that issue.

First, let me acknowledge the frustration of members of the Committee with the way that I've handled the questionnaire. I want to make absolutely clear my assurance to this Committee today, in the most sincere and unambiguous way possible, that I take very seriously my obligations to the Committee and I want to try to be as forthcoming and complete in the information that I provide to you. I think it's fair to say at this point, Madam Chair, that if I had had an opportunity to do things differently, I would certainly have done things differently.

When I prepared my original submission to the Committee, I made a good-faith effort to find responsive materials to the questions. It became evident to me quickly that the submission was incomplete, so I redoubled my efforts to search for anything that could possibly be responsive to the questionnaire. The result was the supplemental submission that the Committee has, I believe dated April 5th.

Some of the items in the supplement are things I should have found the first time. Other items in the supplement were things that I did disclose in the original submission, and where I was able to find a web page or a web link that described or announced that event, I included that as well.

Still other items were things like brown bag lunches and faculty seminars and alumni events that I hadn't thought to look for the first time because they were of the sort of thing that I do day-today as a professor and not things that I prepare remarks for, or even keep careful track of.

I submitted all of these items to the Committee in the interest of providing the fullest possible information for your consideration and I'm sorry that the list is long, and I'm sorry that I missed things the first time.

For better or for worse, Madam Chair, I have lived most of my professional life in public. My record is an open book. I absolutely have no intention—and frankly, Madam Chair, I have no ability—to conceal things that I have said, written, or done. So I want to express to you today and to all the members of the Committee my fullest commitment to providing all the information that you need and want in considering my nomination, and I would like to do anything I can to earn the trust of the members of the Committee in my obligation to be forthcoming, both in my testimony today and with respect to the written materials.

Senator FEINSTEIN. Well, thank you very much. I mean, you're not the only nominee that hasn't been able to provide all documents at a given time.

In testimony before this Committee, you criticized some of the judicial opinions of then-Judge Alito, and particularly four of his opinions on the death penalty. Now, I'm one that has supported the death penalty, so I have two questions. The first is this: what was your objection to then-Judge Alito's decisions in this area? The second is: will you have any problem upholding the death penalty as a Circuit Court judge?

Professor LIU. I'm happy to address this, Senator. If I may, I'll just take them in reverse order. The answer to the second question is absolutely not. I would have no difficulty or objection of any sort, personal or legal, to enforcing the law as written with respect to the death penalty. My writings have never questioned the morality or constitutionality of the death penalty, and I would enforce the law as written.

With respect to then-Judge Alito, I believe I submitted for this Committee's consideration my analysis in a few of the death penalty cases on which he sat as a Third Circuit judge, and those were cases in which there were divided panels, and thus the most contentious cases.

I think in all four of those cases there were dissenting views offered by Judge Alito's Third Circuit colleagues, including in each case Republican-appointed colleagues on the bench. And I believe my testimony, as well as written materials, highlighted what I thought were some concerns that were legitimately expressed in those cases. I believe in three of the four of those cases, his view did not prevail and in one of those cases his view did prevail.

Senator FEINSTEIN. Thank you.

Senator SESSIONS.

Senator SESSIONS. Thank you.

Professor Liu, I appreciate your statement about the omissions.

I think you are correct that some of the items may not have been easy to discover or remember. Some of them, as you noted, should

have been disclosed. The questionnaire calls for all interviews you've given to newspapers, magazines, radio, television stations, provide the dates of those, and so forth, and you failed to do that.

It sort of comes on the heels of the Attorney General having forgotten that he filed a brief with Janet Reno and two other former government leaders in the Padilla case prior to his confirmation.

So it just raises a point to me that this is a serious question. I'm going to continue to look at this, but I feel like you did not spend enough time on this. Perhaps some of it was because the hearing was moved so rapidly. But those supplementals that you filed were as a result of complaints and questions from the staff, things that bloggers had found and others had found that was produced after the date of the first setting of your hearing, was it not?

Professor LIU. Yes, it was, Senator.

Senator SESSIONS. We want to be sure that we have a complete and fair hearing. I think it's fair to ask what standards we should use in evaluation of a nominee. You, in 2005, were highly critical of Chief Justice Roberts' nomination. I consider him to be one of the finest nominees ever received by the court. You wrote, "There is no doubt Roberts had a brilliant legal mind, but a Supreme Court nominee must be evaluated on more than legal intellect." I think that's correct and I agree with you on that.

Then you criticized Chief Justice Roberts' work for a group called The National Legal Center for the Public Interest, stating that "its mission is to promote, among other things, free enterprise, private ownership of property, and limited government. These are code words for an ideological agenda hostile to the environmental, workplace, and consumer protections."

By the time Chief Justice Roberts was nominated to the District Court in 2001, in addition to his clerkships, he had served as a top lawyer at the Department of Justice. For the same office you have, he was nominated.

In the White House Counsel's Office, he was Principal Deputy Solicitor General. He led the appellate practice at a prominent law firm, had argued 39 cases before the Supreme Court, more than I think anybody in the country at that time, and certainly of his generation, as well as cases before every Federal Court of Appeals in the country.

I understand that you were criticizing his nomination to the Supreme Court, but how do you compare your experience to move to the court that is one step below the U.S. Supreme Court? How do you compare your experience to that of now-Chief Justice John Roberts?

Professor LIU. Well, Senator, I'd be the first to acknowledge that the Chief Justice has an extraordinarily distinguished record, both as a lawyer and as a judge. I believe most any nominee would be fearful of comparing their records to that of the Chief Justice.

I suppose, Senator, that I would leave the comparison to others. I haven't had some of the experiences that Chief Justice John Roberts had when he was nominated to the bench, but I'd like to think that, Senator, I've had other experiences that might be valuable as contributions to the bench.

Senator SESSIONS. Well, likewise, you were highly critical of Justice Alito's nomination and testified against his confirmation. You

testified that, “Intellect is a necessary, but not sufficient credential. Equally important are the subtle qualities of judging that give the law its legitimacy, humanity, and semblance of justice. We care about nominees’ judicial philosophy.” So do I. I agree with you on that.

Likewise, I think you would acknowledge that Justice Alito had an extraordinary record. He served for 3 years as Assistant U.S. Attorney in the Appellate Division, Assistant Solicitor General at Department of Justice, the Office of Legal Counsel in Department of Justice, U.S. Attorney for New Jersey, had argued 12 cases before the Supreme Court, at least two dozen cases before the Federal Courts of Appeals. So have you argued any cases before the Supreme Court or any cases before the Federal Courts of Appeals? Professor LIU. Senator, I have not argued any cases before the U.S. Supreme Court. I have argued one case before the U.S. Court of Appeals for the DC Circuit.

Senator SESSIONS. Now, I want to be fair about this. I know Senator Feinstein believes, and I do, that we shouldn’t personally attack nominees. But in your testimony, in the Alito nomination, I had not recalled the intensity of your remarks.

You said at that time, “Judge Alito’s record envisions an America where police may shoot and kill an unarmed boy to stop him from running away with a stolen purse; where Federal agents may point guns at ordinary citizens during a raid, even after no sign of resistance; where the FBI may install a camera where you sleep on the promise that they won’t turn it on unless an informant is in the room; where a black man may be sentenced to death by an all-white jury for killing a white man, absent, say, multiple regression analysis showing discrimination; and where police may search what a warrant permits, and then some. Mr. Chairman, I humbly submit, this is not the America we know, nor is it the America we aspire to be.”

Do you think that’s a fair analysis of his record? Do you think it meets the standards of civility that we would normally seek to achieve in this Senate confirmation process?

Professor LIU. Well, Senator, if I may explain, I think that the passage you read is perhaps unnecessarily colorful language that I used to describe a set of holdings or opinions that then-Judge Alito had expressed that are analyzed in the testimony that I gave to the Committee.

Let me, if I may, back up and simply say that, as with Chief Justice Roberts, I have the highest regard for Justice Alito’s intellect and his career as a lawyer, and I think in many ways my regard for Justice Alito goes even further because he and I share an immigrant family background.

He, too, I think, came from humble origins and attended public school and made the most of all of his opportunities to accomplish all that he has accomplished today, so I have the highest regard for those accomplishments and his trajectory. My criticisms and the concerns that I expressed were limited to one area, and that was the area in which individual rights come up against assertions of government power.

In that area, I had some specific concerns about then-Judge Alito’s opinions on the Third Circuit and it did not—my testimony

about him did not extend further into other areas of his jurisprudence on which he has written as a justice and as a judge.

Senator SESSIONS. Well, thank you. Time is up. I would just say, I do think that's unfair to him. I think he's a mainstream justice and it raises questions to me about where your philosophy of judging is.

Senator FEINSTEIN. Thank you, Senator Sessions.

Senator Leahy.

Chairman LEAHY. Thank you.

Professor Liu, I am extremely impressed with your background. I note where Richard Painter, who was the Chief White House ethics lawyer under President George Bush and worked during the Roberts and Alito nominations, he had worked with a number of President Bush's nominees on their questionnaires. He has no problem with your responses to the questionnaire. He said that a lot of the items left off the original disclosure were relatively unimportant or redundant of what had already been disclosed. He went on to say that he doubted if we'd learn anything new from it. I agree with the former official in the Bush administration.

I also recall, on these questions of what might be said when President Bush nominated University of Utah Professor Michael McConnell. I noted earlier his provocative writings. He wanted us to reexamine the First Amendment free exercise clause, the establishment clause, opposition to *Roe v. Wade*, opposition to the Violence Against Women Act which had passed here nearly unanimously. But—but—when we asked him, he said, "I agree with the doctrine of *stare decisis*." Now, I supported his nomination. He went out of here and was confirmed the next day. I'd love to see that same standard applied to you. The standards of Republican and Democrats applied. Professor, I'd like to see the same standard applied to you.

So let me ask you these questions: would you recuse yourself from litigation on issues that you've been involved with?

Professor LIU. Mr. Chairman, I would, in all models that would come before me, if I were lucky enough to be confirmed as a judge, apply the principles of recusal that are contained in the U.S. Code, as well as the Canon of Judicial Conduct. I think those standards require judges to avoid the appearance or reality of any conflict of interest or any appearance of bias, and I would apply those with great fidelity and in consultation with my colleagues on the bench who have had experience with those standards.

Chairman LEAHY. I know anytime that I argued cases before the Circuit Court of Appeals I was mindful of the fact that the Circuit—the judges would normally follow their own precedent, but absolutely would follow Supreme Court precedent. If you go on the Ninth Circuit, as I hope you do, will you follow the precedents of the Ninth Circuit, but especially the precedents of the Supreme Court?

Professor LIU. Absolutely, I would.

Chairman LEAHY. Would you feel bound by the precedents of the Supreme Court as a member of a Court of Appeals?

Professor LIU. Absolutely, I would.

Chairman LEAHY. And would you keep an open mind in cases coming before you?

Professor LIU. I would approach every case with an open mind, Mr. Chairman.

Chairman LEAHY. Now, many of your academic writings have set forth your view of how to remain faithful to the values enshrined in the Constitution. There have been questions raised here that you have criticized some in the past in the Supreme Court. I am reminded what Chief Justice Roberts said recently. He thinks people should feel free to criticize what we do. I think all of us feel that way, the same as they are free to criticize those of us here.

Michael McConnell. Outspoken, but a brilliant law professor that President Bush nominated to the Tenth Circuit. He harshly criticized the Supreme Court's decision in *Bob Jones*. That was an 8:1 decision, an 8:1 decision, saying the IRS could revoke the university's tax exemption because it violated anti-discrimination laws.

Now, he was enormously critical of that. He was confirmed by a voice vote.

Now, do you believe, just because, like Michael McConnell, who was supported by every single Republican, who had been extraordinarily critical of the Supreme Court—do you believe that any criticism you might have made would make it more difficult for you to follow precedent?

Professor LIU. No, Mr. Chairman. I think that there's a clear difference between what things people write as scholars and how one would approach the role of a judge, and those two are very different things. As scholars, we are paid, in a sense, to question the boundaries of the law, to raise new theories, to be provocative in ways that is simply not the role of a judge to be. The role of the judge is to faithfully follow the law as it is written and as it is given by the Supreme Court. There is no room for invention or creation of new theories. That's simply not the role of a judge.

Chairman LEAHY. Thank you.

I would note a letter written to us by Kenneth Starr and Akhil Amar from Yale Law School, written to Senator Sessions and myself. I'll give the last paragraph of it: "In sum, you have before you a judicial nominee with strong intellect, demonstrating an independent and outstanding character," referring to you. Of course, as you know, the nonpartisan ABA gave you the highest possible rating they could give a nominee.

He said, "We recognize that commentators on all sides will be drawn to debate the views that Goodwin has expressed in his writings and speeches. In the end, however, a judge takes an oath to uphold and defend the Constitution. Thus, in our views, the traits that should weigh most heavily in the evaluation of an extraordinarily qualified nominee such as Goodwin Liu are professional integrity, the ability to discharge faithfully any abiding duty to uphold the law. Because he possesses those qualities to the highest degree, we are confident that he will serve in the Court of Appeals fairly and confidently and with great distinction." Then Kenneth Starr and Professor Amar go on to say, "We support and urge a speedy confirmation." I'll put that in the record.

[The letter appears as a submission for the record.]

Chairman LEAHY. And we have letters from 27 former prosecutors and judges, commending your commitment to the Constitution. These are judges and prosecutors who have supported the death

penalty, for example. Madam Chair, I'll put those in the record.

[The letters appear as a submission for the record.]

Chairman LEAHY. I strongly support this nominee.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Senator Hatch, you are next.

Senator HATCH. Professor Liu, welcome to the Committee. We're happy to have you here. I think your wife and family are beautiful. There's no question that I believe you're a very good intellect with a lot of ability.

As I evaluate judicial nominees, I try to get a concrete picture of the kind of judge they would be. I look for clues about how much power they think judges should have over the law that judges use to decide cases. The law that Federal judges use is written law, such as written statutes and a written Constitution. We could all read what the law says. The real issue for judges is determining what the law means. The more leeway judges have, the more places they can look for the meaning of the law, the more powerful judges become, and are.

The more power judges have over what the law means, the less power the people and their elected representatives have. Now, this issue is very important to me as I look at a judicial nominee's record, including yours. So I want to note some of the things you have written that appear to relate to this question. In your book, *Keeping Faith With the Constitution*, you wrote that the Supreme Court looks to "social practices, evolving norms, and practical consequences" to give meaning to the Constitution.

In an interview about that book you said that "the Constitution should be interpreted in ways that adapt its principles and its text to the challenges and conditions of our society in every single generation."

In a *Stanford Law Review* article you wrote that courts must determine "whether our collective values on a given issue have converged to a degree that they can be persuasively crystallized and credibly absorbed into legal doctrine."

Now, it seems to me that this type of an approach gives all the power to the judges. It lets judges decide what they want the Constitution to mean, not necessarily what it says. After all, judges pick which social practices to consider. Judges decide whether and how this or that norm is evolving. Judges pick which social challenges or conditions are relevant, which values are collective, how they have converged, crystallized, or been absorbed, if your philosophy is correct.

Well, you wrote in your book that this approach is what you mean by fidelity to the Constitution. To me, it sounds more like fidelity to judging and to judges rather than the Constitution. Now, this approach just gets covered in whatever judges want to do with the law.

Let me ask you this: do you stand by these approaches that you have written and spoken about, and do you really think that judges should have this much power over the law? What is left that can be identified as the Constitution after judges have finished adapting it generation after generation to changing conditions and challenges? What will be left of the Constitution if that is the approach?

These are things that bother me and these are things that say to me that—well, put question marks in my mind as to whether or

not you would properly act as a judge. It's one thing to be a law professor and to make a lot of hypotheticals and other things. I make a lot of allowances for law professors, and we're very grateful to good law professors like you. But what about that? Do you still stand by these approaches as though you can just about make of the law anything you want to? I know you can't mean that, but tell me what you think.

Professor LIU. Senator, first of all, thank you for extending the welcome to me and to my family. It means a lot to them and it's an honor for them to be here. Thank you.

Senator HATCH. You're welcome.

Professor LIU. Second, Senator, I think that whatever I may have written in the books and in the articles would have no bearing on my role as a judge. My role as a judge is, I think, clearly to follow the path laid for——

Senator HATCH. But how can you say that? Isn't that your core philosophy, what you've written?

Professor LIU. That is my core understanding of the duties of an appellate judge. And if I may, Senator, go further——

Senator HATCH. Sure.

Professor LIU [continuing]. Then to address specifically the concerns you raised about the book. And let me say at the outset that I can certainly understand how it is that the phrases you've read lead to the concerns that you have. I appreciate the opportunity to explain a little bit more.

In the book, I think one of the things we tried to articulate is that our Constitution is very special because it is a written Constitution, it's a text. And as a text, it is a permanent embodiment of the core principles and the structure of government that we have chosen as a Nation. So that text is very special and the principles that are embodied in that text endure over the ages. Those things do not change. The text of the Constitution does not change, except through the prescribed procedures under Article 5 of the Constitution. What we argue in the book is that in order to preserve the meaning of that text, in order to preserve the power of that text, it's necessary for judges, in some areas of the law, to give those phrases and those words meaning in the light of the current conditions of the society. Not all phrases, mind you. I mean, there are many parts of the Constitution that are clear-cut. You need two witnesses to convict someone of treason, not one. I think that's a clear rule, so there's no room for interpretation there.

But where the Constitution says, for example, "unreasonable searches and seizures," which are prohibited under the Fourth Amendment. Well, the Supreme Court has instructed that in applying that phrase, what we are to look to are the legitimate expectations of privacy that people have in the society.

I'll just recount, to close my answer, one example that we offer in the book. In 1961, the court decided a case called *Katz v. United States*, which considered the issue of whether the requirement of physical trespass was necessary to make out an unreasonable search or seizure under the Fourth Amendment. That was a case about telephone wire taps.

The court said, you know, in this day and age the answer to that is no, a physical trespass is not necessary to make it out because

people have come to have a legitimate expectation of privacy in their telephone calls. That's not simply a situation of new technology and old principles. Rather, I think it requires the court to have discerned, what is the societal expectation we have around phone calls as opposed to other challenges we have today, for example, like e-mail, Internet, and those are all issues that are still being litigated today where perhaps the privacy principles are not as clear-cut. But with respect to phones in 1961, the court said the Fourth Amendment applies to telephone wire taps. That's the kind of approach, Senator, that those passages you read are meant to illustrate. Senator HATCH. Thank you.

Madam Chairman, my time is up. I think I'll probably have to wait till the second round.

Senator FEINSTEIN. Thank you very much, Senator Hatch. Appreciate it.

Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Madam Chairman. Welcome, Professor Liu. I was going to follow up on Senator Hatch's questions. You explained what this Constitution fidelity means to you. My question is, do you believe there's only one legitimate way for a judge or a scholar to interpret the Constitution?

Professor LIU. Senator Klobuchar, no, I don't think there's any one specific way. In fact, the court, in a variety of cases, has said that there's not any formula, there's not a mechanical process. The art of judging involves more than just a formula.

Senator KLOBUCHAR. So are defenders of, say, originalism, like Justice Scalia, do you believe they are less legitimate judges than another judge that might have a different philosophy?

Professor LIU. I would never say that Justice Scalia is a less legitimate judge than any other judge. Senator, I think the term is one of these terms that is used by lots of people to mean lots of different things, so I'd like to be careful in my answer to that question.

If originalism is taken to mean that the original understanding of the constitutional provision is the sole touchstone and decisive sole touchstone for interpreting the Constitution, I would simply observe that the Supreme Court, throughout its history, has never adhered to that methodology.

If originalism is taken to mean instead that the original meaning, and of course the text of the Constitution, are very important considerations that any judge, in interpreting a provision of the Constitution, must look to, absolutely. I believe that is absolutely true. In many cases, that could be determinative. But it is not, in some sense, the sole or ultimate touchstone against which all other considerations must yield.

Senator KLOBUCHAR. So you would agree that judges could come at this with different constitutional interpretations when they look at a specific case? What I'm getting at here, is I was listening to your answers to Senator Leahy about the difference between a scholar and a judge and I was thinking back to my law school days at University of Chicago, where Professor Easterbrook was my professor, who's now on the Seventh Circuit, and also now-Judge Posner was at the University of Chicago when I was there.

They clearly had a philosophy on economics and the law, a view of the law that not everyone would agree with. But do you believe

that you can separate those out? And by the way, I think Judge Easterbrook was 36 years old, even younger than you, when he came before this Committee and he was confirmed through the process, despite having a view that might not be reflected in all of the past court decisions and interpretations. So my question of you is, do you believe that judges can separate out not only their goal as a scholar, but also as an advocate from what they become as a judge?

Professor LIU. Indeed, Senator, I believe they can, and I believe they must.

Senator KLOBUCHAR. Very good.

I wanted to get at something else. We've been focusing a lot on some of your past advocacy or scholarship, as we would with any nominee, but just your life story, as I see your parents sitting back there, having emigrated from Taiwan. My understanding is, you didn't even learn English until you were in kindergarten. Is that right?

Professor LIU. That is true, Senator.

Senator KLOBUCHAR. And that your parents believed in the value of education. The little boy who didn't learn English till he was 5 years old went on to be valedictorian of his public high school class, and then went on to attend Stanford, Oxford, and Yale.

Could you talk about how your parents' story and your life growing up, which is half your life, while we focus so much on individual things at the end, how that will influence you as a judge?

Professor LIU. Certainly, Senator. I guess the way I would put it, is that I feel in many ways, Senator, I've lived a very ordinary life, but I've had very extraordinary opportunities along the way. The first of those extraordinary opportunities was to have parents who really cared about education. They came from a society that did not at the time know many of the freedoms that we take for granted in America, and that has always sat with me as a very important consideration in my coming to the law.

I've also had tremendous educational opportunities at the fine institutions that you mentioned, and I've also had tremendous mentors along the way. I'm very glad that Congresswoman Matsui is here today because her husband Bob, who died an untimely death, was one of my early mentors in politics and the law.

So the combination of all of these, I think, has made me the person who I am, and I believe in all the intangible ways, that would influence my perspective, hopefully for the better, as a judge.

Senator KLOBUCHAR. Thank you very much.

Senator FEINSTEIN. Thank you, Senator Klobuchar.

Senator Kyl is actually next on the list, but he has very generously permitted Senator Coburn to go ahead. So, thank you, Senator Kyl.

Senator Coburn, I'll call on you.

Senator COBURN. Thank you, Senator Feinstein. And thanks, Senator Kyl. We have a hearing going on the financial breakdown in the Permanent Subcommittee on Investigations, and so I appreciate the opportunity.

Professor Liu, welcome. I'm sorry I was not here for your opening statement, but I've read it.

I want to go through a series of questions for you. I must tell

you, based on what I've read, I'm highly concerned. I think you and I have a completely different philosophy when we look at the U.S. Constitution, and I want to try to understand where you are to give you a fair opportunity to convince me of how wrong I am.

You co-wrote an article on "Congress, the Courts and the Constitution: Separation Anxiety." You criticized the Supreme Court for overturning the Gun-Free Schools Act, legislation that restricted gun rights, stating, "Even more astounding than the court's willingness to override common-sense legislation with such broad support—the House passed it with only one dissenting vote and the Senate passed it by unanimous consent—is its eagerness to do so in terms which are deliberately designed to exclude Congress, and by extension the American people, from playing a part in defining what the Constitution requires and what it permits." You continued in that article, "The recent cases do not pretend to be opening arguments in the longer debate. Instead, they are self-conscious pronouncements asserting the court's authority to be the sole and final arbiter of constitutional meaning. More and more, it seems Congress, and the American people by extension, are regarded by the court as mere targets of judicial discipline, unable to live and govern themselves within judicially enforceable limits. The court may have the final say on constitutional interpretation, but I do not see any reason why it should have the only say."

Then in a press interview concerning a legal challenge to California's Proposition 8 which overturned California's Supreme Court ruling in favor of gay marriage, you said the question before the court was: "Should the democratic process be allowed to enact this discrimination by a simple show of hands or is a more deliberative legislative process required?"

Given the brief that you filed in that case, I assume your answer to the question is no. You further stated in an L.A. Times article, "Proposition 8 targets a historically vulnerable group and eliminates a very important right. Changing the constitution, the State's paramount law, in such a momentous way arguably calls for deliberative, rather than direct, democracy. Indeed, as early as the Nation's founders, our constitutional tradition has favored representative democracy over simple majority rule when it comes to deciding minority rights."

Now, I'm a physician. I'm not a lawyer, along with Senator Feinstein right now on this Committee. We're the only two that aren't. I understand that in one instance you're discussing the Commerce Clause, and in another you're commenting on the Fourteenth Amendment. But it seems to me that you think in one case the American people should have a say in the interpretation of the Constitution through the democratic process, and in another you say they should not.

This distinction, to me, based on these two episodes, would appear that it's purely based on what you personally—what you personally—think of which right is important or is at issue. Can you please explain why a court should consider the will of the majority as expressed through the legislative process when restricting gun rights, but not when upholding the law protecting traditional marriage? Professor LIU. Senator, thank you for the question. I'm pleased

to address it.

Actually, Senator, if I could clarify the passages you read about Proposition 8. I actually testified before the California Assembly and Senate Judiciary Committees in October of 2008 about the legal implications of Proposition 8, in particular, the anticipated State constitutional challenge to the process by which that amendment to the State constitution was adopted.

The testimony I gave was very clear Senator, that I believe that Proposition 8 should be upheld by the California Supreme Court—not struck down, but upheld by the California Supreme Court—under existing precedents. I was asked to testify in my role as a neutral legal expert. And despite whatever other views I might have had about Proposition 8 on the merits, my personal views, whatever, and even my legal views of the past, I testified before that Committee that the California Supreme Court should uphold that Proposition in deference to the democratic process.

Senator COBURN. If I could correct your testimony, what you said in that is that you thought that they would, not that they should. I believe that was your testimony, according to the copies of your testimony that I have here. You said that they would.

So my question remains the same. The question is, how on one hand can you say the court should—in other words, how are you going to pick that? If you're an appellate judge, how are you going to pick which time you say you get the choice or we get the choice? The fact is, that is a whole new intervention in judicial philosophy for me, for an old guy from the sticks in Oklahoma, when I see this book—and I kind of like it and I kind of like what it says, even though sometimes it goes against me—and we're going to be picking which way we're going to do it. To me, I think it's a marked inconsistency.

Let me go on, if I may. In a recent Supreme Court decision, *Roper v. Simmons*, Justice Scalia stated in his dissent that the “basic premise of the court's argument that American law should conform to the laws of the rest of the world ought to be rejected out of hand.” Scalia continues that, in the case before the court, what these foreign sources affirm, rather than repudiate, is the Justice's own notion of how the world ought to be and their dictates, that it should be so henceforth in America.

I happen to have pretty strong agreement with that philosophy, and I'm sure you knew that before coming in here. For that reason, some of your statements about the use of foreign law deeply concern me.

In an article you published, I guess it's Daito University Law School in Japan, you said, “The use of foreign authority in American constitutional law is a judicial practice that has been very controversial in recent years. The resistance to this practice is difficult for me to grasp, since the United States can hardly claim to have a monopoly on wise solutions to common legal problems faced by constitutional democracies around the world.”

The only problem with that is, when you're sworn in you will swear an absolute oath and allegiance to this document. It's not about having a monopoly on being accurate, it's a monopoly on the rulebook that we have.

So would you give me your philosophy on how you will utilize foreign

law to interpret our constitutional laws and treaties?

Professor LIU. Certainly, Senator. I do not believe foreign law should control in any way the interpretation of United States law, whether it's the U.S. Constitution or a statute. I believe that the use of foreign law contains within it many potential pitfalls. In other words, I think that what I've observed the Justices doing in some of these cases, is they choose the law that is favorable to the argument. It is not a canvassing of the world's practices or in any way a full account of the various practices throughout the world with respect to their laws.

And one of the things I think that makes this country unique and worth cherishing is that we are in many ways—in many, many ways—a much freer nation than many of the other countries around the world. So I think there are many hazards involved in looking at foreign law as guidance for how we interpret our own principles.

I think the statement in the Law Review, if I could clarify, because I think there was only just a brief paragraph, alludes only to the idea that I think foreign precedent can be cited in the same way that a Law Review article might be cited, which is simply to say, judges can collect ideas from anyplace that they find it persuasive. But there's a very important difference, Senator, and one that I take very seriously, between looking for guidance or ideas versus looking for authority. Authority is the basis on which cases are decided, not ideas or other forms of guidance.

Senator COBURN. All right. Thank you very much. I went way over. I apologize.

Senator FEINSTEIN. Thank you, Senator.

Senator Kyl, you are next.

Senator KYL. Thank you very much.

Welcome, Professor Liu. Just on that last point, you distinguished between authority and ideas. The role of a judge is to decide the case, applying the authorities to the facts of that case.

What's the role of ideas that would warrant a citation to foreign authorities?

Professor LIU. Well, Senator, I think that judges——

Senator KYL. Excuse me. If I can just add your exact quotation here: "The resistance to the practice," you say, "is difficult for me to grasp, since the United States can hardly claim to have a monopoly on wise solutions to common legal problems."

Professor LIU. I think, Senator, the allusion is simply to the idea that judges, in their ordinary practice, do cite a variety of sources to bolster their reasoning on a particular point. But I go back to the point I was trying to make to Senator Coburn, which is simply that the role of a judge, to me at least, is only to decide—to make determinative—to make determinative the applicable precedents and the written law—namely our law—on a particular case or controversy.

Senator KYL. So then why do you write that the resistance to this practice—and you say "the use of foreign authority." That's what you're talking about, not just citing Law Review articles. You say, "The resistance to this practice is difficult for me to grasp, since the United States can hardly claim to have a monopoly on wise solutions to common legal problems faced by constitutional democracies around the world." It seems to me, there are two problems

with this. The first, is finding “wise solutions” as opposed to interpreting the law; second, the reference to “foreign authorities” as ever being appropriate to interpret a U.S. law, except of course in treaty situations and the like.

Professor LIU. Well, Senator, to the first point about the term “solutions”, I didn’t mean it in any way to implicate the notion of policy solutions. I meant the way in which judges have to, when they decide cases, articulate a legal rule. That’s the only meaning that I intended there.

With respect to the use of foreign precedents, I would simply say that the use of those precedents can in no way be determinative. I think a review of Supreme Court cases that have actually implemented this practice shows, I think quite clearly, that the mention of foreign citations in those cases, to my reading at least, is not doing any legal work in the analysis and——

Senator KYL. Well, if I could just respectfully disagree with you, it is used, at least in one decision that I can recall, to bolster the argument that was made by the Justice writing the opinion. So we’ll talk more about this, this idea of authorities versus ideas, but I’m a bit confused.

I also would like unanimous consent, Madam Chairman, to put into the record a bench memo, National Review Online, Wednesday, March 24th piece, that responds to the Amar-Starr letter that I think Senator Leahy put in the record, but in any event, someone did.

Senator FEINSTEIN. So ordered. That will go in the record.

[The memo appears as a submission for the record.]

Senator KYL. Thank you. Thank you.

And Professor Liu, let me also follow up on something one of my colleagues talked to you about. Senator Sessions, I believe, quoted the comments that you made relative to Justice Alito’s vision of America. Now, to me, this was reminiscent of Senator Kennedy’s quite unfair characterization of Judge Bork’s vision of America in the very famous speech that he made.

Do you really believe that the words you spoke, what you said, is Justice Alito’s vision of America?

Professor LIU. Senator, I think that that phrase is perhaps unnecessarily flowery language to make the simple point, that I was trying to give a series of examples of opinions that he rendered.

Senator KYL. So you don’t really believe that it represents his vision of America?

Professor LIU. Well, I don’t think that it represents his vision of America that he would implement as policy the practices described in that—in that paragraph. It was only meant to say that as a judge, he believed that those practices were permissible in America——

Senator KYL. Well, why did you say it that way then? I mean, this calls into question your judicial temperament. That’s a key consideration for members of this Committee. That is not tempered language. I mean, you would acknowledge that, I gather. I hope.

Professor LIU. Well, Senator, that—that statement——

Senator KYL. Would you acknowledge that that is not temperate language?

Professor LIU. Perhaps not, considered in isolation, Senator. But that paragraph comes after 14 pages of quite detailed legal analysis

of Judge Alito's opinions, and that was the concluding—I believe, penultimate paragraph in that 14-page analysis.

Senator KYL. Well, I see it as very vicious and emotionally and racially charged, very intemperate, and to me it calls into question your ability to approach and characterize people's positions in a fair and judicious way.

Senator FEINSTEIN. Thank you very much, Senator Kyl.

Senator Cornyn, you are next.

Senator CORNYN. Thank you.

Senator FEINSTEIN. Before you go, Senator Cornyn, I'd like to acknowledge the presence of Representative Bobby Scott, again from the other House. He also serves on the Judiciary Committee. Welcome, Representative Scott.

Please proceed.

Senator CORNYN. Good morning, Professor Liu. Welcome. I don't think there's any doubt in my mind, certainly, that you are an American success story, as a son of immigrants and someone who's taken advantage of the opportunities that fortunately we all have here in America, to get to the very top of the legal profession, in your case.

I guess the question I have is, is this the right job for you? It's not just a question of brilliance, it's not just a matter of your academic skill. It really is, is this the right job for you?

I know that you and Senator Hatch talked about the role of a law professor relative to that of a judge, but let me tell you specifically what some of my concerns go to. They may seem relatively mundane, but I think they really are very important.

I note that you say in your questionnaire you've not tried any cases in courts of record to verdict, judgment, or final decision. Is that correct?

Professor LIU. That is correct, Senator.

Senator CORNYN. Having been a State court judge myself for 13 years, I am really very troubled by the fact that, as Senator Sessions documented in his questions, that the lack of attention and diligence, and frankly, sloppiness, in your response to this Committee's questionnaire. There were four occasions when you supplemented your responses, not because you discovered they were incomplete, but because Committee members and staff went on Google and found speeches, documents, press releases, and things that you hadn't previously disclosed.

From my experience as a former trial judge, I will tell you that if a lawyer came into my courtroom and failed to respond completely and accurately to a request from the other side for information and had to be called to task four different times before they

finally got the honest, complete, and truthful answer, that that lawyer would find themselves held in contempt of court, or worse. So I don't know whether it's because of your lack of experience in a courtroom or what it is, but can you offer me any comfort at all that this is not really just an act of contempt, but is just some other explanation?

Professor LIU. Certainly, Senator. I have the—I want to express again the fullest commitment that I possibly can to providing this Committee with any information that it wants or needs in evaluating my candidacy for the bench.

Senator CORNYN. Have you actually apologized?

Professor LIU. I have, Senator.

Senator CORNYN. You have?

Professor LIU. In my transmittal letter of the April 5th submission, I did express an apology, and I'm happy to reiterate it here, which is that I'm very sorry for the omissions that existed in the initial questionnaire. I would simply say, though, that the lion's share of items that I submitted in the supplements were not items that were brought to my attention by others, they were items that, upon more diligent searching, I was able to provide to the Committee, including all the various instances in which I moderated a panel, or accepted an award, or emceed an event, or introduced a speaker, or spoke at a brown bag. I tried my best to comb through all the Internet sites and all the other places that one could look for such things. I understand the Committee's frustration with my handling of the questionnaire, and I would have done things differently if I had had the opportunity.

Senator CORNYN. Can you assure us that you've made a complete and accurate response to the Committee's questionnaire at this point, or are there other items that we are going to discover or find out about that have not been revealed?

Professor LIU. Well, Senator, in the—in the revised submission of April 5th, I detail in the beginning of the answer all the searches that I conducted. And if the Committee or any member would desire that I do any more searching, I would be happy to do that with dispatch and turn over any other material that I'm able to find.

Senator CORNYN. Let me turn to part of your response earlier. I think it was in response to Senator Kyl's questions. You characterized some of your criticism of Justice Alito as "not striking the proper balance between individual rights and governmental power."

I'd just like to ask you, in a straightforward way, what do you think the Tenth Amendment of the Constitution means, and how should it be applied? It reads: "The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively, or to the people."

Do you recognize any limit on Federal power to do whatever Congress decides it wants to do or do you think that that's—in other words, do you think the Tenth Amendment is a dead letter?

Professor LIU. Absolutely not, Senator. The Supreme Court has made amply clear that the Tenth Amendment stands for the fundamental principle of federalism that imbues our structure of government, and I respect those precedents and would apply them faithfully.

Senator CORNYN. Yet, you criticized Chief Justice Rehnquist's decision or opinion in the Lopez case, which was the application of that very same doctrine of federalism. Is that correct?

Professor LIU. I—I expressed concerns about that decision, yes.

Senator CORNYN. And I would tell you that the American people—I hear it from my constituents in Texas, and I hear it from people all across the country, are very concerned about the aggressive growth of the Federal Government and the intrusion of the Federal Government in their lives, which is one reason why at least 16 Attorney Generals—maybe there are more by now—have filed suit, challenging, for example, the individual mandate in the

health care reform bill as an unprecedented expansion of Federal power into their lives.

I'm not going to ask you for a legal opinion about that, since that may come before you, if you are confirmed. But do you recognize that our government is not a national government, but a Federal Government, and that individuals and States reserve significant power to make decisions affecting their lives that the Federal Government cannot, and should not, touch?

Professor LIU. Absolutely, Senator. I think that from the founding of our country, we have always had a Constitution that defines the powers of the Federal Government as a set of enumerated powers only. In other words, the Congress of the United States, together with the President, the political branches are not—it's not a legislature of general powers, as the States are. The States are legislatures of general powers, but the Federal Government is not. So, the whole notion of enumeration presupposes the idea that it is a government of limited powers.

Senator CORNYN. Madam Chairman, I know my time is up. I would just like to note that I know Professor Liu has been rated unanimously "Well Qualified" by the American Bar Association's Standing Committee on the Federal Judiciary, even though, as he's acknowledged, he hasn't tried any cases in courts of record to verdict, judgment, or final decision.

I would note, just a few years ago when Judge Frank Easterbrook was nominated to the Seventh Circuit, that it appears that a different standard was applied by the American Bar Association when they gave him a majority "Qualified", minority "Not Qualified" because they said he lacked experience as a practitioner. Maybe the ABA, when they come—and I assume they will at some point—to testify can explain that. But it appears to be a double standard.

Senator FEINSTEIN. Thank you very much, Senator Cornyn.

Senator Kaufman.

Senator KAUFMAN. Yes. Welcome to the Judiciary Committee and the Supreme Court nomination process.

[Laughter.]

Senator KAUFMAN. As you can see, there are some basic differences about the Constitution on this Committee. Senator Cornyn, who I hold in very high regard, I think may have—and Senator Sessions, and Senator Kyl—a different opinion about the role of the Federal Government, which we battle on every single Judiciary Committee meeting, but in a very collegial way, in a very good way. I think we've all kind of agreed to disagree on some of these issues.

Anyway, can you talk a little bit about, you clerked both in the District of Columbia Court of Appeals and the Supreme Court. Can you tell me what you kind of learned about the role and function of appellate judges during your experience?

Professor LIU. Certainly. Thank you, Senator Kaufman.

I had the enormous privilege to clerk for two outstanding judges. And one of the things I learned as a law clerk on the U.S. Court of Appeals for the DC Circuit, I think, is applicable to the point that Senator Cornyn raised. It is true, I have not tried cases to verdict and I wouldn't claim expertise in that—in that way.

But one of the things that the judge for whom I clerked routinely did, was he instilled in his law clerks an appreciation for the role of the District judge, and the role of the District judge in understanding how litigants bring cases and how cases get framed. Thus, in virtually all the cases I can remember, he always sent us down to the first floor of the courthouse to go read the record, read the record of what happened in the court below, and those determinations and that record was due an amount of deference because a judge had already passed over this issue once.

And I think that that perspective has always stayed with me, that although we have a system of hierarchy in our courts, all of the members of the courts serve as Article 3 appointees, in some sense as co-equals in the judicial system, and they serve different functions at different points.

And so I would pay, I think, as an appellate judge, very careful attention to the standards of review that apply to the case at hand, because many of those standards of review caution against appellate judges making, in essence, new determinations or as if they were writing on a blank slate when in fact the issue has always been passed through once.

Senator KAUFMAN. And so many of the questions you're asked here, your personal beliefs really don't matter that much, do they, as long as you're a Circuit Court of Appeals judge?

Professor LIU. Not at all, Senator. In fact, the other thing I learned on the DC Circuit was how many issues—virtually everything that comes through the door—has around it a set of applicable precedents, and so there really is no room, in the cases that come up, for judges to invent new theories or to create new doctrine. They are applying the law as it has been interpreted by the Supreme Court and as it has been written by Congress in the cases of statutes.

Senator KAUFMAN. So you don't have real flexibility in terms of your personal beliefs on issues?

Professor LIU. Personal beliefs, I believe, Senator Kaufman, never have a role in the act of judging.

Senator KAUFMAN. Your experience at Department of Education. What do you think came out of that that would help you serve on the Circuit Court?

Professor LIU. Well, I had the great distinction of being able to work for some extremely talented leaders in that department. I think what it gave me was some perspective on how agencies make decisions, and to the extent that the Courts of Appeals do hear cases that concern administrative law, it does help, I think, to have some appreciation for the ways in which regulatory decisionmaking, as well as other forms of guidance, get made through the Federal agencies.

Senator KAUFMAN. And how about your experience in private practice? How would that, do you feel, help you if you get on the Circuit Court?

Professor LIU. I feel enormously grateful that I had the time that I had at the O'Melveny & Myers law firm, a collection of outstanding and extremely talented and smart lawyers who showed me in many ways how businesses approach problems, that the role of the lawyer is absolute loyalty to his or her client, and the vigorous

and zealous advocacy for the client's interests. I learned, I think, a respect for the process of litigation and the virtues of our adversarial system of litigation.

I also learned what it was like to bill a lot of hours from time to time, but I think that that is part of the zealous advocacy that is expected of any lawyer who takes on a client.

Senator KAUFMAN. I want to thank you for your public service. This is difficult, but the fact that you're willing to do it and the fact that others are willing to do it really makes this country function. I think everyone here applauds the fact that you are willing to make the sacrifices you have, and even more important, your wife is willing to make the sacrifice she's going to have to make for you to go through this, and then to serve on the Circuit Court. So, I want to thank you for your service to your country.

Professor LIU. Thank you, Senator Kaufman.

Senator KAUFMAN. Thank you, Madam Chairman.

Senator FEINSTEIN. Thank you very much, Senator Kaufman. Because of the importance of this nominee, we will certainly have a second round. I'd like to just indicate, my intent would be to go to 12:30, take a half-hour break, and reconvene at 1. We have four additional nominees to hear, and so I know that this is a long wait for you, but I hope you understand. I think it's very important that members have an opportunity to ask Professor Liu all the questions that they want to ask and take the time that's required to do it. So I must apologize to you, but it is the way of the Senate. So if there's no objection, we'll proceed with a half-hour break in about 45 minutes, and then begin again.

Senator SESSIONS. Thank you for that. I think the nominee raises a lot of important philosophical questions about law and the Constitution and we do have a number of questions, so I thank you for the courtesy of allowing sufficient time.

Senator FEINSTEIN. Thank you very much.

To begin the second round, I'd like to say a couple of things. I really think that there is a double standard being applied here, so I'd like to take a look at just a few of President Bush's nominees. Let me begin with the Chief Justice. Chief Justice Roberts failed to provide documentation for over 75 percent of the speeches and remarks listed in his questionnaire. Not a single Republican objected when the Committee received 15,000 supplemental documents just 4 days before his confirmation hearings were scheduled to begin. In fact, both Chief Justice Roberts and Justice Alito supplemented their questionnaires several times after returning them,

including, 75,000 and 36,000 pages of documents, respectively.

Judge Michael McConnell has been covered: appointed to the Tenth Circuit, a prolific constitutional law professor from 1985 to 2001. He did not list a single speech or talk on constitutional law or legal policy. He was confirmed.

Judge Jeffrey Sutton, appointed by the President to the Sixth Circuit, submitted a questionnaire that simply stated "I have given numerous speeches to local Bar Associations, Ohio judges through the Ohio Judicial College, the Federalist Society, and continuing legal education seminars regarding the United States Supreme Court and the Ohio Supreme Court. I either spoke from informal notes or extemporaneously." He was confirmed.

Judge Brett Kavanaugh, as has been stated, appointed by President Bush to the DC Circuit, submitted a questionnaire that listed 22 speaking events, prefaced by this statement: “I’ve given remarks on occasions, etc.” He was confirmed.

Judge Catharina Haynes, appointed by President Bush to the Fifth Circuit, submitted a questionnaire that said, “As a local judicial candidate I’ve been to dozens, maybe hundreds, of events where each candidate is asked to introduce himself or herself. I have no recordings or notes of these matters, no way to track accurately the dates and locations.” She was confirmed.

Judge Diana Skyes, appointed by President Bush to the Seventh Circuit, submitted a questionnaire along the same lines. The same thing for Judge Kent Jordan to the Third Circuit.

So I think this, and I must say, is remarkably unfair. We have heard the nominee clearly state that he overlooked some things, clearly state that he’s prepared to do anything he can to see that the Committee is fully informed of his writings. I don’t know what more a nominee can do, you know. To rise this to the level that he should be denied confirmation, and this being one of the major reasons, seems very unfair to me.

I would like to ask one question on the commerce clause, however. In recent years—the commerce clause, as we all know, is a very important clause of the Constitution which essentially allows the Congress to legislate in a number of different areas as long as they relate to interstate commerce.

In recent years, the Supreme Court has used a much more constraining view of the commerce clause to strike laws such as the Gun-Free Schools Act of 1995, and the Violence Against Women Act of 1994. So what is your understanding of the scope of Congressional power under Article 1 of the Constitution, particularly the commerce clause?

Professor LIU. Well, Senator, in those two cases, as well as other cases that have followed on—in particular, I’m thinking of the medicinal marijuana case, the *Gonzales v. Raich* case, the court has articulated a doctrine in which there are essentially three categories of ways in which Congress can exercise commerce power, the most substantial of which is a third category in which the court says that the Congress can legislate on matters having a substantial effect upon commerce. A lot of the constitutional doctrine has turned on, what is a substantial effect?

In the Gun-Free School Zones case, as well as the Violence Against Women case, which I know both of them are very important to you, Senator, the court articulated a doctrine that said that the activity being regulated has to be economic in nature, but it stops short of saying that that is an absolute requirement before the substantial effects analysis can get going because in the medicinal marijuana case just a few years afterwards the court said, but we have to look at the activity as a class of activities, not just the individual instance of an individual possessing a gun, or in the case of the marijuana case, the individual who is desiring the medicinal marijuana, but rather we have to look at it as a class.

And I think that’s where the state of the law is right now, is that the court has said that—has put a focus on the economic nature of the activity, but has instructed the lower courts to look at that

issue, not simply as the individual instance but as a class. That is the doctrine, as I understand it, and I would faithfully apply that doctrine in any case that came before me as a judge.

Senator FEINSTEIN. Thank you very much. My time is up.

Senator SESSIONS.

Senator SESSIONS. Professor Liu, your article I quoted earlier, “Rethinking Constitutional Welfare Rights”, is a troubling document to me. You say there that your thesis is that the legitimacy of judicial recognition of welfare rights depends on “socially situated modes of reasoning that appeal not to transcendent moral principles of an ideal society, but to the culturally and historically contingent meanings of social goods in our own society.”

Well, I presume that’s a standard you think judges should apply.

Do you think a standard, once you reject “transcendent moral principles for an ideal society and move to culturally and historically contingent meanings of particular social goods in our own society”, what kind of legal standard is that? Doesn’t that allow a judge to do anything they want to do?

Professor LIU. Senator Sessions, the Supreme Court has, I think, pretty clearly said that judges cannot create welfare rights in the Constitution.

Senator SESSIONS. No, no, no. What you wrote.

Professor LIU. And I——

Senator SESSIONS. Let me just say——

Chairman LEAHY. Let him answer the question.

Senator SESSIONS. I’m going to allow him to answer, but I just want to say, we do have a time problem. I’m asking a specific question, so if you can do the best you can to be succinct, I’d appreciate it.

Professor LIU. Certainly, Senator. I simply mentioned what the Supreme Court said because in that article I express agreement with what the Supreme Court had said on this score, which is that—elsewhere in the article I say very clearly that judges have no role in inventing welfare rights out of whole cloth and doing it on their own.

Instead, I think the passages that you’re reading there are perhaps overly academic language for a simple point, which is that if there are going to be welfare rights in society they must come from the legislature, they must come from Congress, and I used the term “legislative supremacy” to capture that idea. And so——

Senator SESSIONS. Well, could I say, you say “so conceived justiciable welfare rights reflect the contingent character of our society’s judgments.” So you’re talking about a judge’s welfare rights.

Professor LIU. Senator, yes. The role for judges that the article lays out is only that role that the Supreme Court’s own precedents have supported in the past, which is when the legislature has created a program of benefits or some sort, there are various challenges that are occasionally brought to eligibility requirements or termination processes, and the court has seen those as justiciable issues.

Senator SESSIONS. Does it raise a question of whether a State or a Federal Government could reduce welfare rights once they’ve been established? Is that a justiciable——

Professor LIU. Senator, elsewhere in the article I make very clear

that the courts have—I believe I used the term “no role for courts at all” in disturbing legislative judgments of that sort, and I use the example of Congress’ 1996 welfare reform law which ended cash assistance to poor families as an entitlement, and I said that the courts have no role at all in questioning that judgment by Congress. Senator SESSIONS. Well, you do say that you deal with that danger. You note there’s a danger of court take-over of the legislative process, but you say that can be avoided “when courts employ constitutional doctrine in a dialogic process with the legislature to ensure that the scope of welfare provision democratically reflects our social understanding.”

That seems to mean that you’re saying a judge has a right to use the power of the court—lifetime appointment—“to ensure that welfare provisions democratically reflects our social understandings.”

So to me, that’s an unintelligible standard and you’re giving a virtually unlimited power of courts to review welfare or health care type legislation.

Professor LIU. Senator, I think that, once again, if I could, you know, try to in some sense cut through the academic jargon there, the only——

Senator SESSIONS. I’ll agree.

Professor LIU. Thank you. On that point we can agree. I guess I’d simply say that the point was trying to capture the way in which the Supreme Court has in past cases approached questions, constitutional questions, that have arisen about legislated programs of benefits. One thing to note about that, Senator, is just that that area of doctrine has not in some sense spiraled out of control. It’s not that judges are, even in an everyday kind of way, making decisions about what kind of welfare rights people should get. In fact, it’s a very limited role, and that’s the only role that I envisioned in the paper.

Senator SESSIONS. Well, in your statements that were not originally produced, but later produced, commenting on your book, *Keeping Faith With the Constitution*, you defined what fidelity to the Constitution is. I expressed what I think I believe, and what Professor Van Alsteen believes, which is, faithfulness is following it as written even if you don’t like it.

But you say, “what we mean by fidelity is that the Constitution should be interpreted in ways that adapt its principles and its text to the challenges and conditions of our society in every single generation.”

So it seems to me you’re saying that a judge can ignore the proper way to amend the Constitution and adapt not only its principles, but its text, to meet whatever challenge they divine at a given time. Correct me if I’m wrong.

Professor LIU. Well, Senator, that is not what I believe. If I may, I think that the interpretation of the Constitution always has to be on the basis of legal principle and not on the basis of what a majority of the society thinks or what the judge in question thinks.

Across any—in any generation, the interpretation of the Constitution has to be guided by not what makes people happy, rather, it has to be guided by the faithful application of the text, the underlying principles, and the precedents that have accrued up to that time.

Senator SESSIONS. Well, I’m going to try to fairly evaluate that

answer, but I don't think your writings reflect it. So, it's up to my judgment. I mean, I have to make a decision: is what you're saying today consistent with what you said then? I would note that—thank you.

Senator FEINSTEIN. Thank you, Senator Sessions.

Senator Leahy.

Chairman LEAHY. Thank you. I would note that it's one thing to write academic papers and another thing to testify under oath. I think that Professor Liu has testified very well here today. I would note that the article we've been talking about explicitly rejects the idea that the courts have the power to create benefits and respects the role of the legislature in the creation of those. I mean, the article speaks for itself. I would hope we would keep on the facts on his legal abilities. I've heard comments made suggesting your views are racist, and I just find that outrageous.

Let's talk about your legal reasoning. We throw around these ancillary charges so easily these days. I don't know why, what has happened in this country. I remember when I said, as many others did, that I opposed Justice Alito's nomination and I was attacked as being—in a full-page ad as being anti-Italian.

Now, when my grandparents emigrated to the United States to Vermont from Italy, when my Italian-American mother and her siblings were growing up, knowing how much I respect my uncles and aunts and cousins in Italy and visit them often, I remember sitting on my Italian grandparents' knees and speaking Italian with them, I think it's kind of a stretch.

It's sort of the same stretch that you heard when I opposed Judge Pryor's nomination and Senator Kennedy and Senator Biden and Senator Durbin and I were called anti-Catholic. I remember talking to my pastor leaving mass the next day. He said, "Where does this sort of thing come from?" And so I would hope we can talk about the law and not things that have belonged to another—maybe another time, an unhappy time in our country.

We've heard you criticized that you hadn't had a lot of courtroom experience. You know, I don't recall a single Republican saying anything when Judge Kimberly Ann Moore was nominated by George W. Bush, President Bush, for the Federal Circuit. She had had 2 years as a clerk, 1 year of private practice, and 7 years in academia. Nobody felt this disqualified her.

Or when Judge J. Harvey Wilkinson was nominated at the age of 39 by President Reagan to the Fourth Circuit, he had had 1 year as a clerk, 5 years as a newspaper editor, 2 years in the government, 5 years in academia. He was confirmed.

Or Judge Frank Easterbrook, nominated by President Reagan at the age of 36. He spent 1 year as a clerk, 5 years in the government, 7 years in academia. Let's talk about realities. Let's leave these straw men kind of complaints out of it.

We have so many people sitting on our Courts of Appeals nominated by Republican Presidents, supported by both Republican and Democrats who do not begin to have the kind of background that you do, or begin to have the kind of support, bipartisan support, that you have. I think we shouldn't forget that.

The American Bar Association's Standing Committee on the Federal Judiciary found you unanimously "Well Qualified." That's the

highest possible rating. They did it in a nonpartisan hearing.

Strong support of both your home State Senators. Even a conservative Fox News commentator recently conceded your qualifications for the appellate bench are unassailable.

Now, tell us again the difference between the role of the legal advocates or academic commentators, as you have been playing, as opposed to the role you'd have to play as a judge. Tell us the difference, and tell us whether you think you'd have any difficulty adjusting to a new role as a judge.

Professor LIU. Certainly, Mr. Chairman. I think the role of a judge is to be an impartial, objective, and neutral arbiter of specific cases and controversies that come before him or her, and the way that that process works is through absolute fidelity to the applicable precedents and the language of the laws, statutes, regulations that are at issue in the case.

Academics, when they write, are not bound in the same way. The job of law scholars, when they write, largely, I think, is to probe, criticize, invent, be creative—in other words, many of the qualities that are not the qualities that one expects the judicial process to possess.

One thing that I would like to highlight, though, between these two types of roles, which I hope comes through upon a review of my record, is that there are some similarities between, hopefully, the legal scholarship and the process of judging, which is that I would hope that my record shows an open mindedness, an ability to consider all points of view, a rigor, a respect for the law as an enterprise that has to have integrity, and all of those forms of discipline that make for habits of mind of good listening that I think in other ways makes—could make a person a good judge.

Chairman LEAHY. Thank you. As my sainted mother would have said, *molto grazie*, but as I'll say, thank you very much.

Thank you, Madam Chairman.

Senator FEINSTEIN. Thank you very much, Senator Leahy.

Senator KYL.

Senator KYL. Thank you, Madam Chairman.

Professor Liu, just expanding on this point that we've been discussing earlier, you're distinguishing between the situation in

which Congress has legislated in an area, and then the court can

in effect breathe life into extensions or deal with issues of eligibility for those rights. That was the way you described the substance

of what you wrote in this one article.

Let me ask if you personally believe—personally believe—that

“the duty of government cannot be reduced to simply providing the basic necessities of life. The main pillars of the agenda would include expanded health insurance, child care, transportation subsidies, job training, and a robust Earned Income Tax Credit.” In

fairness, that is exactly what you wrote. That's a direct quotation.

Also, “that we should be thoughtful, but not bashful, in forging political solidarity necessary for redistributive mutual aid.” Do you personally believe those statements?

Professor LIU. Senator, I'm not familiar with which—is that from my article? Or which text is that that you're reading from?

Senator KYL. Yes. I'm sorry. We were quoting from that article.

It is the “Education, Equality and National Citizenship”, in 116,

Yale Law Journal, 2006.

Professor LIU. OK. As in—as in all things, Senator, I think I—I stand by my writings. I—I—whatever views I’ve expressed about those matters, however, I would set aside absolutely in my role as a judge, because quite frankly I don’t see the role of a judge as being involved in those kinds of issues.

Senator KYL. And I appreciate the fact that you’ve said that. The problem is, colleagues here on the Committee have talked about the need to get judicial nominees—now, I grant, this was in the context of a Supreme Court nominee—who would have certain agenda that they would bring to the office, agendas that conform with my Democratic colleagues’ agendas, which I don’t necessarily share. One of the concerns that I have expressed about an activist judge is whether or not you approach deciding cases with those agendas in mind or you lay them aside.

Now, you’ve expressed—and I did quote accurately, I think, from that article what you wrote. I perceive these to be your personal opinions. Then I also perceive your view of the law to be that we should find ways to accommodate those opinions, albeit you do say once the legislature has acted. I’ll just quote directly how you state that. This is on “How Welfare Rights May be Recognized Through Constitutional Adjudication in a Democratic Society.”

“Once a legislative body creates a welfare program it’s the proper role of the courts to grasp the community meaning and purpose for that welfare benefit. When necessary, courts should expand the wealth redistributing effects of the program to satisfy needs of equality and national citizenship.” Then you note that you can do that, for example, by “invalidating statutory eligibility requirements or strengthening procedural protections against withdrawal of benefits”, and that is what you said earlier.

Professor LIU. That’s true.

Senator KYL. That seems to me to be an agenda. You bring an agenda to the court, and you’ve written about how that agenda can be accomplished through the judicial process, not the legislative process. You say in another place in this article, “the constitutional guarantee of national citizenship has never realized its potential to be a generative source of substantive rights.” You talk about how it was “neutered by previous court decisions, the affirmative as opposed to negative interpretation of the Constitution.”

So I view this as, you have these views. They are very liberal views. You believe that once the legislature has opened the door, that courts can be used to expand those rights in what you would consider to be an appropriate way.

Professor LIU. Well, Senator, I guess I would say that the—those are my views and they’re accurately reflected in the passages you—you wrote—you—you spoke. I guess I would characterize them though not as an agenda, but rather as my endorsement of precedents of the court that have done precisely those things. And as a lower court judge, I would follow certainly those precedents, but any precedents that—

Senator KYL. I recognize what you’re saying is that when the legislature has acted, courts—there’s some precedential ability of courts then to—either through restricting qualifications, for example, of expanding those rights. But it is very clear from what you’ve

said not that these are just examples that you picked out of thin air as, gee, this is what the court might do, but rather, this is your personal view of something the court should try to do. Am I wrong? Professor LIU. Senator, I'm not sure that I would say that they are things that the court should try to do. I think that a court—certainly if I were confirmed as a judge—would have to simply follow what the Supreme Court has instructed the courts to do on particular issues. But if I could put the passages you read in further context, I would say that most of my writing in this area and the area that Senator Sessions has asked me about—and I understand this is an interest of great importance to you, Senator—most of my writings on education, on welfare, and on, you can call it, broadly, social policy, if you wish, have been directed actually at policymakers and at legislators, not at judges. So if you look across the broad range of my scholarship on a sort of, I guess, page-for-page basis, most of what I've written is directed at legislators because I come at this from a perspective of judicial restraint in this area. I think that those articles, I hope, convey my understanding of how difficult it is for courts to get involved in this area. We have some historical lessons learned about those—about these kinds of areas. And so that's why I think most of my work, my scholarly work, has actually been directed at policymakers, not really at urging courts to do more.

Senator KYL. If I could just—one final question. Can you see why the passages from this particular article raise the doubt that I have expressed to you?

Professor LIU. I certainly do.

Senator KYL. Thank you.

Professor LIU. I understand.

Senator FEINSTEIN. That completes our second round. Now, Senator Kyl—excuse me. Senator Cornyn has indicated that he is on his way back and will arrive within 5 minutes and does wish a second round. I'll tell you what we will do, if that's all right. We'll begin a third round, and then I'll give Senator Cornyn some additional time when he comes in. We're just going to go for another 15 minutes and then recess.

Are you bearing up all right?

Professor LIU. I'm doing just fine. Thank you, Madam Chair.

Senator FEINSTEIN. You've got amazing cool. Congratulations. I wish I had.

In describing your approach to constitutional fidelity, you have said that the practical consequences of legal rules matter. I happen to agree with this. For example, in the Lilly Ledbetter case, the court interpreted Title 7 to require a woman to pay a pay discrimination case—excuse me, to file a pay discrimination case within 180 days of when her employer first paid her less than her male counterparts, even if she had no way of knowing at that time that she was being paid less. Congress has had to pass a new law to overrule that decision and communicate to the court that Title 7 was not intended to have this result. Senator Mikulski led this battle, and I think it was the first bill signed by President Obama.

So here's the question: when do you believe it's appropriate for a judge to consider the practical consequences of legal rules?

Professor LIU. Well, Senator, I think that that's one of the aspects

of decisionmaking that I think properly inform the consideration of most cases that come before the courts. Law affects people's lives and it's not a bunch of words on paper, it's not a bunch of cases in the books. These are real things that affect people's lives. Decisions made by a judge should not be based on favoritism toward affecting a person's life one way or the other, it should be based, though, on an appreciation of what's at stake in a particular case. I don't think that one can really grasp the magnitude of the particular case or controversy without understanding how that plays out in people's lives.

Senator FEINSTEIN. Well, thank you.

Just so people know, there is no way that Lilly Ledbetter could have known. She didn't find out until years later what had happened. So the question was, did she have redress? The court ruled no, and we changed that to change the law.

The Supreme Court stated conclusively in the case of *Grutter v. Bollinger* that State universities have a compelling interest in obtaining the educational benefits that flow from a diverse student body. That case and others also made clear that efforts to attain diversity must be carefully tailored to the true educational benefits and not a racial quota.

Now, in log entries, you have been accused of favoring racial quotas, so I want to ask you plainly: do you favor racial quotas, and do you believe they are constitutionally permissible?

Professor LIU. Senator Feinstein, I absolutely do not support racial quotas. In my writings, I think I've made very clear that I believe they are unconstitutional.

Senator FEINSTEIN. So will you follow Supreme Court law, as articulated in *Grutter v. Bollinger* and *Gratz v. Bollinger*, that laid out the court's guidelines for when and how it is permissible for a university to seek to attain a diverse student body?

Professor LIU. Absolutely, I would, Senator. I think my writings have written approvingly of the standards set forth in those cases.

Senator FEINSTEIN. The question that Senator Kyl asked you on social welfare rights—let me ask this question in another way. In a highly theoretical article in the 2008 *Stanford Law Review*, you critiqued two other scholars' notion of constitutional welfare rights and put forth a theory of your own in which courts engage in "a dialectical process of engagement with the political branches and the public they represent."

Now, I'd really like to hear you explain this in plain English. I mean, you're obviously very smart. You've been gifted with a great mind. How much is genetic and how much is learned, I don't know, but you have an unusual mind. You're also very young. Sometimes one can get so fancy in their writing that the plainspoken person attributes a lot of things to it that may well not be there. So could you take a crack at what the "dialectical process of engagement with the political branches and the public they represent" actually means?

Professor LIU. Certainly, Senator Feinstein. Let me preface my answer by promising that if I were ever confirmed as a judge, I would not write opinions that sound like that.

[Laughter.]

Professor LIU. All I mean to say, I think, in that article, is it is

a characterization of the process through which the precedents of the court have in a sense gone back and forth with the exercise of the legislative power to define the scope of welfare rights. In that back-and-forth process, courts occasionally—occasionally—weigh in with principles under the due process clause or the equal protection clause.

But the legislature, I argue in that—in that piece, retains the final word with respect to the creation of those rights and the elaboration of when those rights are going to kick in and not kick in. The final word belongs to the legislature.

And so I hope that what comes through in the article is a posture really of judicial deference, because what I'm arguing against in the first half of the article is a strain of thinking that was popular in the 1960s and 1970s, that judges should just wholesale invent these things and come up with their own moral theories of what the Constitution requires. I wholesale reject that point of view. That is what the first half of the article is devoted to, is a rejection of that point of view.

Senator FEINSTEIN. Thank you very much.

Senator SESSIONS. Excuse me. Could I defer to Senator Cornyn, and then come to you, for his second round?

Senator KYL. Madam Chairman, if we're going to do that, and we're going to break at 12:30 but we're going to come back at 1, if I could just excuse myself right now then and be back.

Senator FEINSTEIN. Yes, certainly.

Senator KYL. Thank you very much.

Senator FEINSTEIN. So why don't you, in an effort to extend all of the exigencies of membership which aren't usually extended, let me give you your second round now so you wouldn't have missed it.

Senator CORNYN. Thank you, Madam Chairman.

Professor, I assume you're familiar with the work of Judge Stephen Reinhardt on the Ninth Circuit?

Professor LIU. I wouldn't say I'm familiar with his work, but I know a little bit about him and his reputation, yes.

Senator CORNYN. Do you recall having disagreed with a decision by Judge Reinhart?

Professor LIU. Senator, actually, I can't even think of an opinion by him off the top of my head.

Senator CORNYN. Okay. Fair enough. Fair enough.

Let me then ask you, is your theory of constitutional fidelity substantively different from the living Constitution view endorsed by other liberal scholars?

Professor LIU. Well, Senator, I think the term "living Constitution" has been used by lots of people to mean lots of things. I don't like the term and I—in the book, we reject the term because it suggests that the Constitution is a malleable document that can be read to have words in it that really are not in it.

And I think we take the position that the Constitution is a written text for a special reason, and that is because the text was meant to be the enduring thing that judges would have to apply in the course of deciding cases and not, you know, something that's extra—you know, outside of the text and not something that they would invent on the fly.

Senator CORNYN. On the issue of foreign law, Professor Koh—I guess now he is, of course, at the State Department—has described the debate between transnationalists and nationalists when it comes to the application of foreign law, or what its use might be by judges interpreting, for example, the United States Constitution, United States law.

I believe he thinks that transnationalists believe that domestic courts have a critical role to play in incorporating international law into domestic law, while nationalists claim only that the political branches are authorized to domesticate international legal norms.

Do you agree, first of all, with this distinction by Professor Koh, and if you do, which are you, a transnationalist or a nationalist?

Professor LIU. Well, Senator, frankly, I'm actually not familiar with this debate in the law. I would say perhaps something similar to what I said to Senator Coburn on this issue, which is just that I think that in the decision about what the meaning of American statutes are and what the meaning of the American Constitution is, American precedents and American law are the things that control.

Senator CORNYN. Changing subjects again, in your article, "Rethinking Constitutional Welfare Rights"—I think this has come up in a different context since I had to leave—you write that legislation may give rise to a cognizable constitutional welfare right if it has "sufficient ambition and durability, reflecting the outcome of vigorous public contestation and the considered judgment of a highly engaged citizenry."

I don't know if that would pass Senator Feinstein's standard for plain speaking. But I would just ask you reflecting on the recent debate on health care reform, which passed after vigorous public contestation. I think we could all vouch for that. Does that give rise to—does passing a law like that give rise to new constitutional rights?

Professor LIU. Well, I think it's an excellent question, Senator Cornyn. I want to say, I have not—I don't have a view on that because, like many Americans, I actually haven't read the health care legislation. And beyond that, I think it's—within just the confines of the quote that you read, the durability of it is something I guess that's remained to be seen, because I understand that it's being challenged in the courts and that even Members of Congress may wish to revisit elements of it in the future. So I think my initial take on your question, although I haven't thought about it very much, is just that it's too early to tell.

Senator CORNYN. Well, so you would at least hold out the possibility that an act of Congress could confer welfare rights or benefits that would somehow become constitutional in nature, which then could not be repealed by a subsequent Congress. Is that right?

Professor LIU. It could always be repealed, Senator. My theory doesn't suggest that it could never be repealed. It could always be repealed. And the only way—I mean, the term "constitutional", as I've used it, is perhaps misleading. It only means to say that, according to the court's precedents, the court has recognized, in the application of, say, equal protection principles or due process principles, a recognition of the rights that are created by Congress, and in making decisions under those other clauses of the Constitution, have given them due weight in the consideration of, say, eligibility

restrictions or termination processes. Those are the cases in which I—those are the cases I’ve endorsed in that article as conferring a judicially cognizable right. So, that’s—that’s the only sense in which I mean those terms.

Senator CORNYN. My last question is, in that same article you cite the Supreme Court’s decision in *USDA v. Murray* of 1973 as an example of how the court may invalidate an act of Congress and recognize a welfare right. You note that Murray directly engaged the court in substantive policy judgment, an approach that you call “plausibly appropriate in exceptional cases.”

Can you list some examples of exceptional cases in which it would be appropriate for the court to engage in substantive policy judgments, and as a judge, if confirmed, would you feel authorized to engage in such substantive policy judgments?

Professor LIU. Senator, I don’t think I would feel authorized to engage in substantive policy judgments because I think that’s a prerogative that belongs to the democratic process. I think, actually, in the article, Senator, if I recall correctly, I was critical of the Murray decision because it went further in that regard than my theory would—would—would permit.

Senator CORNYN. Well, thank you very much, Professor.

Professor LIU. Thank you.

Senator CORNYN. Thank you, Senator Feinstein.

Senator FEINSTEIN. Thank you, Senator.

The hour of 12:30 has arrived. I would like to place some letters in support in the record. So ordered.

[The letters appear as a submission for the record.]

Senator FEINSTEIN. We will take a one-half hour break. When we come back, Senator Sessions will lead off. So, please, get some food and some drink and come well prepared.

Professor LIU. Thank you. Thank you.

Senator FEINSTEIN. Thank you.

The Committee will be in recess until 1 p.m.

Senator FEINSTEIN. The hearing will resume.

As I indicated, we will begin with the Ranking Member, Senator Sessions.

Senator? Oh. If I might say something while you’re getting ready.

The procedure is really to do just two rounds for an appellate judge. I want everybody to have an opportunity to ask questions, and so I suggested to the nominee that we will do just whatever it takes to have the questions asked and answered. I would really beg the forbearance of the other four nominees, although I suspect you don’t mind not being on the hot-seat.

[Laughter.]

Senator FEINSTEIN. Senator Sessions.

Senator SESSIONS. Thank you so much.

Well, words have meaning. We are in a serious location, dealing with serious issues involving the appellate courts of the United States and a lifetime appointment. I remain uneasy about some of the—not so much the answers you give, but how they square with what you’ve written before and what impact that has on my understanding of the clarity of your thought and how you approach judging.

There’s quite a bit of difference between a theoretical law professor and the practicality, the day-after-day duty of enforcing contracts

and disputes and ruling on rules of evidence, so I have to say that.

With regard to the death penalty, you've written some about that. Let me just ask you, first, do you personally favor it? I would say absolutely that this would not impact my view of how you would conduct your office. I think good judges can differ on whether they believe in a death penalty or not, and the critical thing is, I guess, will you follow the law.

So I guess my first question is, do you favor the death penalty or not?

Professor LIU. Senator Sessions, I have no opposition to the death penalty. I've never written anything questioning its morality or constitutionality. I would have no problem enforcing the law as written in this area.

Senator SESSIONS. Well, in talking about—in a report of a panel you moderated called “Civil Rights Litigation in the Roberts Court Era” as part of the Reclaiming and Reframing the Dialogue on Race and Racism, you made some comments about it. You talked about changes in State courts and said, “and part of that movement are changes in some of the State legislation and Supreme Courts is the result of State court decisions that have gotten rid of some bad practices—some State legislation that's gotten rid of some bad practices—and then the absorption of that cultural shift into Federal law through the Eighth Amendment.”

It seems to me what you're saying there is that legislation in various States somehow can change how we should interpret the Eighth Amendment. Do you mean that, and whether or not it applies to the death penalty?

Professor LIU. Senator, I think I was perhaps reporting the way in which the Supreme Court has instructed that the Eighth Amendment be interpreted, and the Supreme Court, in its opinions, looks to the practices of the States in informing the meaning of the Eighth Amendment.

Senator SESSIONS. Well, I'm not sure about that. It seems to me that—well, I could see that that would be a theory. Is that the theory that Marshall and Brennan used when they consistently dissented in every death penalty case, asserting that the death penalty violates the Eighth Amendment prohibition on cruel and unusual punishment?

Professor LIU. Senator, I'm actually not sure what theory they used to arrive at that conclusion. I think the comment that you read tracks more closely to the view that the justices have used since the time, actually, of Brennan and Marshall to articulate the standard by which they determine whether something is or is not constitutional under the Eighth Amendment.

Senator SESSIONS. Well, is it relevant to you too that there are six—I think maybe eight—references in the Constitution to the death penalty and it would be a stretch, would it not, to say that the Constitution prohibits the death penalty, and that any phrase in it, general phrase like “cruel and unusual punishment” should be construed to eliminate what is positively referred to at six or eight different places?

Professor LIU. Senator, I think that is very strong and important textual evidence that the Constitution contemplates the death penalty. The Fifth and Fourteenth Amendments to the Constitution

specifically refer to deprivation of life, but it's followed, of course, with the guarantee of due process of law. But I think that is pretty strong textual evidence that the Constitution contemplates——

Senator SESSIONS. But do you think that the actions by States can change that? That's what you said, it "could shift the absorption of that cultural shift." That's your words. "Some cultural shift can transfer into Federal law through the Eighth Amendment." The implication of your remarks is that it could somehow have the cruel and unusual clause constrict the death penalty.

Professor LIU. Well, Senator, I think my understanding of that is that the court has always said consistently throughout its cases that the imposition of the death penalty is a constitutional punishment within the confines of the other guarantees of the Constitution. I haven't understood those decisions to attempt to outlaw the death penalty. Rather, they have dealt with specific—much more specific issues related to how the death penalty is administered and to whom.

Senator SESSIONS. Well, Professor Liu, two justices on the Supreme Court dissented in every single death case, Justice Brennan and Justice Marshall, on the clear view that it was cruel and unusual punishment.

Professor LIU. I'm not endorsing their view, Senator.

Senator SESSIONS. Well, you seem to in this quote. You can say that today. Your quote here seems to suggest you think that if the States change some of their rules of death penalty, that somehow will allow the Eighth Amendment now and Federal judges to alter what I think is plainly a constitutional punishment.

On the—gosh, time flies.

Senator FEINSTEIN. Yes. Questions are long.

[Laughter.]

Senator SESSIONS. You've written, arguing that the citizenship clause of the Fourteenth Amendment creates a positive right, I would summarize, to whatever benefits are at least necessary to fulfill full participation as a citizen. You go on to note in your "Interstate, Inequality, and Educational Opportunity" piece that the Fourteenth Amendment "guarantee of national citizenship was a generative source of substantial rights."

I'm uneasy a bit to suggest that the plain words of the Fourteenth Amendment are generating rights. But besides that—and you wrote that citizens have "positive rights to government assistance", as I understand it.

That is rights derived from the Constitution, as I understand it, and that "these rights can be a guarantee not only against State abridgment", you wrote, "but also as a matter of positive right." You concluded that such an agenda, a constitutional agenda, would "include expanded access to health insurance, child care, transportation subsidies, job training, and a robust Earned Income Tax Credit." So do you believe that, yes or no?

Professor LIU. I do believe that, Senator. But those arguments are addressed to policymakers, not to the courts.

Senator SESSIONS. Well, that's important—a very important distinction, and I'll review that. It does seem to be consistent with your view of expansive governmental powers.

Senator FEINSTEIN. Thank you, Senator Sessions.

Senator SESSIONS. One thing, and I'll conclude this remark. That is that as you noted, both with Alito and Roberts, judicial philosophy is important. Your writings are the only thing we have to evidence that. I don't think it's sufficient just to say that I'll follow authority somewhere in the system, because many, many times a case of first impression will be before you and your philosophy will indeed impact how the law is shaped.

Senator FEINSTEIN. Thank you very much. You cannot say you have not had adequate time.

Senator SESSIONS. Thank you.

Senator FEINSTEIN. Senator Kyl.

Senator SESSIONS. I believe it was on fast.

Senator FEINSTEIN. Oh, do you?

[Laughter.]

Senator KYL. Thank you, Madam Chairman, and for your patience.

I want to get back to this question of agenda that I was talking about before we had our little break. You, in a broadcast earlier this year, January 3rd, on NPR, were discussing how the Obama administration represented a new opportunity for the American Constitution Society. You said that Obama administration, "that ACS had the opportunity to actually get our ideas and the progressive vision of the Constitution and of law and policy into practice." What did you mean by "our ideas" and your "progressive vision" of the Constitution and law and policy?

Professor LIU. Senator, I think that was a reference to the ideas that underpin the American Constitution Society. I think, as the mission statement of that organization reads, it's a dedication to certain basic principles of our Constitution: genuine equality, liberty, access to the courts, and a broad commitment to the rule of law.

Senator KYL. Is it fairly described as a progressive vision or progressive mission?

Professor LIU. I think many people have described it that way.

I think that's fair, yes.

Senator KYL. Now, the——

Professor LIU. The—the organization, I mean.

Senator KYL. Yes.

Professor LIU. Not necessarily—I think the values are those of the Constitution. I don't think they're—I wouldn't say they're progressive or conservative, or whatever. I think those are the values in the Constitution.

Senator KYL. Well, the way you described it was "the opportunity to actually get our ideas and the progressive vision of the Constitution and of law and of policy into practice", so I assume you subscribe to these views when you talked about "our ideas."

Professor LIU. I have—I think, as I think the record shows, Senator, I have been deeply involved in the American Constitution Society.

Senator KYL. Yes.

Professor LIU. I have served on the board, I have chaired the board.

Senator KYL. There's nothing wrong with having views that are wrong.

[Laughter.]

Senator KYL. No. OK. But I mean, so that's what you meant by

“the opportunity to actually get our ideas and progressive vision of the Constitution and law and policy into practice.” But I guess the follow-up question is, obviously I guess you would say you were speaking in a policy way, not through the judicial process. Is that the way——

Professor LIU. I think—well, Senator, the short answer is yes. In addition, I think that—look, I mean, I think every President has his or her own views of what vision they would like to enforce as a President. I think—I don’t think I was meaning anything more than just that basic prerogative of the President.

Senator KYL. Policy through the appropriate ways of implementing policy.

Professor LIU. Absolutely. Yes.

Senator KYL. And what you’re suggesting is that it isn’t appropriate for a judge to have a policy agenda which he brings to the court and to try to get that agenda adopted into law.

Professor LIU. Absolutely. I think it would not be appropriate for any President to appoint a nominee for a judgeship because of that nominee’s agenda.

Senator KYL. OK. I mentioned to you before, two of my colleagues, one of whom is the Chairman of the Committee—and I’ll just quote from an April 13th article in Politico. He was talking about things like the Ledbetter case and the Citizens United case: “I think what people are going to do is say, do you share our concern about the fact that the court always seems to side with the big corporate interests against the average American.” That’s the end of Chairman Leahy’s quote. Do you think, first of all, that that’s an accurate characterization of what the Supreme Court does?

Professor LIU. I think the Supreme Court tries as best as it can to apply the law fairly and equally to all interests of the society, whether they are ordinary people or corporate interests.

Senator KYL. Do you think that if you were on the Ninth Circuit Court of Appeals that you would have a biased or a preconceived notion or an agenda to try to right a balance and rule more against big corporate interests?

Professor LIU. Absolutely not, Senator.

Senator KYL. How about in cases where the question of executive power versus legislative power or judicial power is concerned? Do you think that executive power has gotten too big and that the courts should try to reign it in and rebalance so that the executive power is more limited vis-a-vis the other branches?

Professor LIU. Senator, I couldn’t say that I have any sort of theory of that sort. I think courts can only decide the cases that are presented to them based on the applicable law. The——

Senator KYL. So would——

Professor LIU. Sorry.

Senator KYL. No. Excuse me for interrupting. So your view would be that if this Committee tried to promote a nominee because of our belief that that nominee would rule against big corporate interests or would rule against executive powers, that that would be an inappropriate basis for us to base support for a nominee on? That’s bad grammar, but forgive me.

Professor LIU. I think—I think that—obviously, Senator, I won’t

pretend to suggest what standards this Committee should use in evaluating a judicial nominee. That's clearly your prerogative and not mine. I would simply say that for all judicial nominees, I think the—I—I would hope that the important test is whether the nominee would be faithful to the law that has been given, and especially for a lower court nominee like myself. In virtually all of these areas, the Supreme Court has said things and handed down precedents, and those would have to be faithfully followed regardless of whatever theory the nominee had about the issue and whatever the nominee may have written previously.

Senator KYL. Thank you.

Senator FEINSTEIN. Thank you very much, Senator.

The hour is now 1:30. I would really like to recess or adjourn this part of the hearing and move on to the four other judges. I know, Senator Kyl, you're going to meet with Professor Liu separately.

Senator KYL. Well, I would like to do that. I'm just wondering, and of course, whatever you would like to do, obviously we can do. I can probably, in about—in no more than 10 minutes, and maybe less than that, conclude the questions that I had, if that would better fit into the schedule. I mean, I'm just going to try to truncate all of this and forget some stuff.

Senator FEINSTEIN. Well, in hopes that you might then vote for him, 10 minutes.

[Laughter.]

Senator KYL. Now, how about that for a test?

[Laughter.]

Senator KYL. Obviously we don't want to approach cases with a preconceived notion, do we? I mean, whatever you want to do. But I think I could fairly quickly get through this.

Senator FEINSTEIN. All right. Fairly quickly.

Senator KYL. OK.

Senator FEINSTEIN. No more than 10 minutes, and then we move on.

Senator KYL. That's acceptable.

Let me ask a question that I asked a previous nominee. The President had talked about—he used two different analogies about judging, talking about the kind of nominee he would nominate.

One, was the first 25 miles of a 26-mile marathon, and the other was, he said, "In 95 percent of the cases the law will give you the answer, the last 5 percent, legal process will not lead you to the rule of decision. The critical ingredient in those cases is supplied by what is in the judge's heart", he said.

Do you agree with him that the law only takes you the first 25 miles of the marathon and that the last mile has to be decided by what's in the judge's heart?

Professor LIU. Senator, I guess that's a colorful analogy, but I'm not sure that's necessarily the one that I would subscribe to. I think that judges should apply the law all the way through, and I'm not a person who believes that what's in the judge's heart should have a bearing on what the outcome of a case would be.

Senator KYL. OK. Relative to the Ledbetter case, because Senator Feinstein asked you if in some cases it's important to determine—let's see. I'll try to get the exact quotation: "to consider the effects of a decision on persons' lives", and that was a case where, at least

presenting it from the Supreme Court's point of view, they interpreted the law as they saw it.

Many people believed that the result was a—led to an unfortunate—that that interpretation led to an unfortunate result on Mrs.

Ledbetter's life. So I guess the question is, should that court have considered the effect on her life in making the decision that it did?

Professor LIU. Senator, not to my knowledge. I mean, it would depend on what the applicable law told you to take into consideration.

But I don't believe——

Senator KYL. You remember the statute of limitations issue.

Professor LIU. Yes, I'm aware. Yeah. And I don't believe that the effect on Ms. Ledbetter's life is the relevant determinant there.

Senator KYL. So presumably you would have just tried to read the statute, and if she lost, then that was something to be corrected by the legislature, if the legislature decided to correct it?

Professor LIU. I would look to the way the statute of limitations had been applied in the precedents. I would look to the statutory—the relevant statute that governed that issue, and I would try to apply it faithfully, yes.

Senator FEINSTEIN. Senator Kyl.

Senator KYL. Sure.

Senator FEINSTEIN. Just for a moment.

Senator KYL. Sure.

Senator FEINSTEIN. My question was a little different. It wasn't how it affected her life, it was the practical consequences of legal law. In other words, the consequence of the law was so convoluted because she could not possibly have known that she should have been paid on a different pay scale.

Senator KYL. Of course, I stand corrected since I was citing Senator Feinstein.

Would that change your answer?

Professor LIU. I think, you know, just to perhaps bring the two things closer together, I think it is important to consider the kinds of practical consequences Senator Feinstein speaks of in the sense of saying, if the statute of limitations doctrine has within it—and I'm not saying it does. Actually, I don't know what—you know, I don't know off the top of my head what the doctrine says. But if it has within it some notion of a notice, that a person has to know when their rights are being violated in order for the statute to start running, then one would have to inquire, how does the law play out in someone's life.

Senator KYL. Yes. That's the question.

Professor LIU. Right.

Senator KYL. I mean, as you know, statute of limitations law is "knew or should have known."

Professor LIU. Exactly.

Senator KYL. And that's as part of the "should have known." If the person should have known and still loses out on benefits, then the court says that's just the way it is. Is that correct?

Professor LIU. That is correct.

Senator KYL. Now, one of the things that you said in this "Keeping Faith With The Constitution" was that the Constitution requires adaptation of its broad principles to conditions we face today, and so on. You said the question is not how the Constitution

would have been applied at the founding, but rather how it should be applied today. I want to focus on that word “should.” Then you went on—there’s an ellipsis here—“in light of changing needs, conditions, and understandings of our society.” I mean, “should” is not—I mean, that’s a normative term. The question—I mean, it really begs the question, what is the legal test for how you decide “should”, right?

Professor LIU. Yeah. Well, Senator, if I could address that. The ellipsis, the missing words, I believe say how it should be applied to preserve the power and meaning of the text and the principles. The “should” is not—I’m sorry.

Senator KYL. No. If—if—I didn’t have those words in here, and that does make it somewhat different.

Professor LIU. Yes. I only mean to say that the “should” is not should as in however a judge feels it should apply, it’s, rather, how it should apply in order to preserve what the text says and what the principles behind the text mean.

Senator KYL. One of the areas that we’ve gotten into in this context is the question of the role of religion or faith in our society.

I just note today there’s a story out of Madison, Wisconsin. A Federal judge has ruled that the National Day of Prayer is unconstitutional. Obviously, neither you nor I have read this decision, but can you think of any determinative constitutional argument that would support that ruling?

Professor LIU. Senator, I’m going to confess that I have spent hardly any time in my career studying the religion clauses of the Constitution, so I am not familiar with the relevant precedents in that area.

Senator KYL. All right. Let me just conclude with this. You’ve been pretty outspoken in your criticism of the current Supreme Court. In fact, you’ve suggested that it lacks both principle and legitimacy. In one article you—and I’m specifically referring to the *Bush v. Gore* decision. You said it was “utterly lacking in any legal principle.” That’s a pretty tough criticism for a Supreme Court decision. And in another you claimed that, again, “if you look across the entire run of cases, you see a fairly consistent pattern where respect for precedent goes by the wayside when it gets in the way of result.” Now, you obviously have a problem with the Supreme Court decisions here, the precedents that you would be asked to apply. You haven’t been bashful about expressing that serious opposition to it, but you’re telling us that, notwithstanding that, it’s “utterly lacking in legal principle.” You would apply the legal principle that you discern that they—or that was the basis of a decision, right?

Professor LIU. Well, Senator, the reason that I perhaps said those words was that the opinion itself stated that it was only to apply in that case. So I’m not sure I would apply that case because the court instructed, in its terms—

Senator KYL. Well, but—yeah. But that’s a distinction there with a difference. “Utterly lacking in legal principle” is different than “wouldn’t apply to a future case.” I mean, are you saying the court had no legal principle basis for the decision that it made in *Bush v. Gore*?

Professor LIU. Well, Senator, I guess the only import of the

phrase that I chose there was that it was my thinking that a legal principle should be something that applies in more than one case because it's a principle.

Senator KYL. So you don't think they used a principle, but simply used some kind of pragmatic decisionmaking in the case?

Professor LIU. Well, Senator, I won't—I guess I won't try to characterize it further here, but I've written what I've written and said what I've said.

Senator KYL. You said that Justice Alito "approaches law in a formalistic, mechanical way, abstracted from human experience." You're very critical of that. Now, would you like to invent a fourth element of a tort besides duty, breach of duty, and damage, or elements of a contract, or whatever? I mean, that's a purely mechanical, formalistic way of deciding how a particular case gets decided, isn't it?

Professor LIU. I think this perhaps goes back to your earlier question, Senator Kyl. It's just that I think that in the application of, say, the elements of tort or the elements of contract there is a human aspect to judging. That's why we don't put legal problems through a machine, or through a formula, or through a computer.

Senator KYL. Well, what is the human aspect? I mean, I can understand that in sentencing, for example, but I'm not sure I can understand it in the question of who should win the case, A versus B, defendant versus plaintiff.

Professor LIU. I think a judge must fairly apply the law as it's given and follow the written law to its logical consequence, no matter what the—what the result is. I think in the application of legal principles, judges are called on to exercise judgment with respect to how they apply in a particular case. I think judges are human beings, and there is often reasonable disagreement about the application of law to facts. But the task, I think, for all judges remains the same, which is applying the law faithfully to the facts of a specific case.

Senator KYL. Yes. And that's a fair statement of the way it should be. We all come to our positions with our preconceived notions, our political ideologies, our notions, and personal experiences can certainly shape how we view certain issues. The job of the judge is to try to remove as much of that from his decisionmaking or her decisionmaking process as possible, would you not agree?

Professor LIU. I would absolutely agree with that, Senator Kyl.

Senator KYL. And finally, would you also agree that when someone has written as extensively as you have in very, as you put it in one sense, colorful language—I mean, you've not been bashful about expressing very specific and strong—obviously strongly held views about certain things, that it can give way to some questioning as to whether or not, the views having been held that strongly, with as much writing about them as you've done and as much very explicit criticism of people who have held a contrary point of view, whether it's possible for you to lay aside those ideas or ideologies and approach cases from a purely objective, unbiased point of view.

Professor LIU. Well, Senator, if I could just offer one thought on that, I hope that my writings demonstrate that I'm someone who's—obviously I have my views, but I hope that I'm someone

who's also able to take into account the opposing views of others. Frankly, I appreciated this opportunity to have this dialog with you, and Senator Sessions, and others about very important and—important and controversial issues of law, about which there is, I think, very reasonable disagreement in America. In fact, one of the great things, I think, about this country and the legal tradition we have is that there is room for that disagreement.

As much as I like my own views, I confess to you that I would actually be a little afraid if I was the only voice speaking and that everything went my way. That's not—that is not the kind of certainty that I have about my own views, and I hope my writings reflect—at least the more thoughtful parts of my writing reflect—that type of discipline and restraint.

Senator KYL. Madam Chairman, thank you. If there is an opportunity for us to visit personally, I would welcome that.

Professor LIU. I would also.

Senator FEINSTEIN. I appreciate that.

Senator KYL. I suspect there may be questions for the record, following up on some of these things, and so on.

Senator FEINSTEIN. Thank you.

Senator KYL. Of course, it goes without saying, you can add to your—or further elucidate on your answers if you want to do that.

Senator FEINSTEIN. Thank you. Thank you.

I'd like to close this off with a few words.

Senator SESSIONS. Madam Chairman.

Senator FEINSTEIN. Yes, go ahead.

Senator SESSIONS. I had a question.

Senator FEINSTEIN. Questions?

Senator SESSIONS. Yes. He got——

Senator FEINSTEIN. If they're softballs, yes. Hardballs, no.

[Laughter.]

Senator SESSIONS. I would note that Jeffrey Sutton's hearing—and he was a mainstream, I think, skilled attorney, had a restrained review of the role of a judge—went on for 12 hours. Senator Schumer had at least one 20-minute round in that time. So we've had some long hearings. This certainly does not exceed the norm.

With regard to your comments about the theory of constitutional fidelity, that it may be valid when the object, fidelity, “may be valid when the object of the interpretation is one of the Constitution's concrete and specific commands.” You said you should show fidelity to that.

For example, I think you've noted that revenue bills must arise in the House. That's unequivocal. What about the Second Amendment, which states that “the right to keep and bear arms shall not be infringed”? Is that a precise command that cannot be abridged by unelected judges?

Professor LIU. Senator, the Supreme Court, I think, has clearly said that that is a clear command that protects an individual's right to bear arms.

Senator SESSIONS. Well, there's some uncertainty about it all, whether or not it will apply to States, cities. So what's your view of the Second Amendment?

Senator FEINSTEIN. Oh, here we go.

Senator SESSIONS. Is it clear on that subject? You don't hesitate to say a revenue bill must rise in the House. Do you hesitate to say that the right to keep and bear arms shall not be infringed? Is that ambiguous?

Professor LIU. Senator, I confess, I have not thought about, written about the Second Amendment in any great detail. The book, I think, discusses the Second Amendment as an example of where judges have applied a basic approach to constitutional interpretation that takes into account a variety of factors, including the original meaning, including the text, but also including the practical consequences of a decision and precedent. I think that's the extent of any view that I have about the Second Amendment and I couldn't really go further.

Senator SESSIONS. You've been clear that you felt that quotas are unconstitutional.

Professor LIU. Yes.

Senator SESSIONS. Is that your personal analysis of that or just based on Supreme Court?

Professor LIU. That is my view, Senator.

Senator SESSIONS. But I'm troubled. That's an easy word to say, but I'm troubled that you have written that Adarand should be consigned to the dustbin of history. Adarand dealt with racial set-asides, giving preference to one person or another as a result of the color of their skin or their ancestry. So I ask you, is that inconsistent? How do you dismiss so firmly the Adarand decision when it seems to be based on similar theories as quotas?

Professor LIU. Well, Adarand is a precedent of the court, and of course I would follow it as a judge. I think my disagreement with Adarand doesn't have anything to do with, I think, it's central holding, which was that all racial classifications by government are subject to the highest level of constitutional suspicion by the courts. I have agreed with that principle in my writings and I have not urged the court to revisit that in any way.

I think the only disagreement I had with Adarand was its extension of the principles of the Crowson case, which dealt with the obligations of States rather than the Federal Government, with respect to the latitude given to implement Affirmative Action programs. I took a perhaps broader view than the court took of that particular issue, and that's the only point of disagreement that I have with the Adarand case.

Senator SESSIONS. One final thing. I'm curious about the American Constitution Society. So many members of the Obama administration talk about a progressive agenda and progressivism. As I understand it, the progressive movement started in the early 1900s, and one of their doctrines was that elite people knew best and that the Constitution was an impediment to them being able to do what was best for those uneducated folk out there in the country.

Is that in any way the American Constitutional Society's view? Why do you use that phrase if it's not?

Professor LIU. Well, Senator, I—this—I think your question rightly, I think, exposes the hazards of using labels of that sort. I guess I'll just put it in plain terms, which is that I think that the American people have always, I think, demonstrated great reverence

for our Constitution because they think of it as a set of principles and a document that they can embrace as their own.

I don't think it's a question at all of whether policymakers or judges are in some sense wiser than the people. There is no greater wisdom than that that resides in the American people itself, and that's what has sustained this country, I think, throughout its many, many years as a nation dedicated to the rule of law under our own Constitution.

Senator SESSIONS. Thank you.

Senator FEINSTEIN. Thank you very much, Senator.

I'd like to conclude this now, but I'd like to say, you know, I've been very, very impressed with you personally. You came to my home in San Francisco, we spent a couple of hours. You joined with my family and me for dinner, and my daughter happens to be a judge, so we had a good conversation. I cannot, in my time on this Committee, remember anybody quite so young that has done so much and I have great respect for that.

I think the thing that all of us have to remember is that this is a very diverse country and the law is equal for everybody, but within that law there are certain tensions and there's dialog, and there's discussion, and there are cases on point and not on point. It really takes a mature mind and someone I think that is willing to weigh the scales equally on both sides and make that transition from an advocate to a judge.

Judge Chen, for example, who was an advocate, he's pending for a District Court, has been 8 years as a magistrate judge and has been able to demonstrate that for 8 years. Here, you are being appointed to the Circuit Court. You haven't had an opportunity to demonstrate that for a period of time. I've asked you about this before. You did not make an opening statement. I would ask you to make a very brief concluding statement just on that point.

Professor LIU. Certainly, Senator. And I think it's a very fair point. Many nominees come before this Committee with backgrounds different from mine. I guess I would say, as you look across my entire record, there are many things I think relevant to the kind of judge that I would be. In my scholarship, I hope that the record shows that I am a rigorous and disciplined person who makes arguments carefully, in a nuanced way, taking into account all the other possible ways of looking at an issue, and where I've decided to lay down my view, I have respectfully treated the views of others.

I think if you look at my teaching, and many of my former students are here today, I hope that what you would find is that I'm a good listener, that I don't seek to impose my views on other people. Rather, what I try to do is elicit all the different points of view that could illuminate an issue.

And I hope that it counts for something that I've won, at least among some, the respect of colleagues who see in me the temperament, the integrity, and the qualities of collegiality and balanced judgment that have enabled me to perform certain leadership positions and to be involved in various organizations that require that skill set. So although, Senator Feinstein, I can't hold up for you a judicial resume that demonstrates in the most direct way the qualities of a judge, I hope at least you'll find analogous evidence in

some of the other things that I've done.

Senator FEINSTEIN. Well, thank you very much. I'm going to excuse you now.

I'd like to correct the record of something Senator Coburn said. There are four of us that are non-lawyers on this Committee, and we believe we see the forest rather than just the trees. So, thank you very much for being here today.

Professor LIU. Thank you very much.

Senator SESSIONS. While you're changing, could I offer for the record some letters, Madam Chairman.

Senator FEINSTEIN. Yes, you certainly may.

Senator SESSIONS. I have 10 letters here from the Judicial Action Group, Criminal Justice Legal Foundation, Judicial Watch, Liberty Council, 42 California District Attorneys who say, "For many years our ability to enforce the law and protect the citizens of our jurisdiction has been hampered by erroneous decisions of U.S. Court of Appeals for the Ninth Circuit. This court has been far out of the judicial mainstream." They say, "Under no circumstances should any nominee be confirmed to the Ninth Circuit who would take that court further in the wrong direction. Regrettably, the President has sent to the Senate just such a nominee."

Also, the Concerned Women of America, the Crime Victims United of California, the American Conservative Union, Republican National Lawyers Association.

Senator FEINSTEIN. Well, thank you very much. Those letters will go on the record.

[The letters appear as a submission for the record.]

Senator FEINSTEIN. And I would like to submit to the record a list of 24 court nominees confirmed under the Bush administration who had no prior experience as a judge. So, those documents will go into the record.

[The information appears as a submission for the record.]

Senator FEINSTEIN. Thank you very much, Professor Liu.

Professor LIU. Thank you.

Senator FEINSTEIN. To your family and those wonderfully well-behaved children, thank you for being here. Bye, Violet. [Laughter.]

Thank you so much.

GOODWIN LIU
WEDNESDAY, MARCH 2, 2011
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:47 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Dianne Feinstein, presiding.

Present: Senators Feinstein, Klobuchar, Franken, Coons, Blumenthal, Grassley, Sessions, Cornyn, Lee, and Coburn.

OPENING STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. This hearing will come to order, and I want to welcome everyone and thank you for being here.

Today the Committee will hear from five nominees for our Federal courts: Professor Goodwin Liu, who has been nominated to sit on the United States Court of Appeals for the Ninth Circuit; Mr. Kevin Sharp, nominated for the United States District Court for the Middle District of Tennessee; Mr. Roy Dalton, Jr., nominated for the United States District Court for the Middle District of Florida; United States Magistrate Judge Claire Cecchi, nominated for the U.S. District Court for the District of New Jersey; and United States Magistrate Judge Esther Salas, also nominated for the United States District Court for the District of New Jersey.

So I want to welcome all of the nominees and also your families. We are very happy to have you here today.

It is my understanding that the Chairman has asked that there be no opening statements by nominees, that we go directly to the questions, and that exists for all levels of the court, except for the Supreme Court. So what I would like to do right now is ask our distinguished Ranking Member if he has any comments, and then I would like to introduce the candidate for the Ninth Circuit.

STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. I will not repeat any of the biographical information that is normal to give in an opening statement, but I want to comment all the nominees for their public service.

This week, we confirmed two more nominees to vacancies in the Federal judiciary, and both of these positions were what is termed "judicial emergencies." We have now confirmed seven nominees during this new Congress, which has only been in session for 19 days. We have taken positive action, in one way or another, on more than half of the 52 judicial nominees submitted during this Congress. So we are moving forward, as I indicated I would do, on consensus nominees.

The primary purpose of this hearing is to review the nomination of Goodwin Liu, nominated to be United States Circuit Judge for the Ninth Circuit. I thank the Chairman for favorably responding to my request for this hearing, and I made the request in order to provide the nominee an opportunity to address the many concerns which have been raised and, of course, to allow new members of this Committee to question and evaluate the nominee, which they have not had an opportunity to do because obviously they were not

Members of the Senate at the time the nomination first came up. While much of this hearing will focus on Mr. Liu, I do not want the district judge nominees to feel slighted in any way. Their nominations are important, and I will look forward to their testimony as well.

With regard to Mr. Liu, the Committee twice reported his nomination on a 12–7 vote. In addition, the nomination has been returned to the President on more than one occasion. Concerns raised during his prior hearing and in written questions include his writings and speeches; his judicial philosophy; public statements, including testimony before this committee; his judicial temperament; and limited experience.

I am concerned about his understanding and appreciation of the proper role of a judge in our system of checks and balances, and I want to make certain, as with all nominees, that personal agendas and political ideology will not be brought into the courtroom. It is ironic that in commenting on the Roberts nomination, Mr. Liu said, “the nomination is a seismic event that threatens to deepen the Nation’s red-blue divide. Instead of choosing a consensus candidate [the President] has opted for a conservative thoroughbred who, if confirmed, will likely swing the Court sharply to the right on many critical issues.”

If confirmed, I am concerned that Mr. Liu will deeply divide the Ninth Circuit and move that court even further to the left. Opinions he could offer would mean his ideology and judicial philosophy would seep beyond Berkeley, California. His potential rulings will affect individuals throughout the nine-State Circuit, including places like Bozeman, Montana; Boise, Idaho; and Anchorage, Alaska. The Senate has a right to determine the qualifications of judicial nominees. The burden is on the nominee appearing before this Committee to demonstrate he or she is suitable for a lifetime appointment to the court. I would note that in his previous appearances and in response to written questions, Mr. Liu failed to provide responsive answers to our questions, and I hope that performance is not repeated today.

I ask unanimous consent, Madam Chairman, that the balance of my statement regarding the district court nominees be entered into the record, and I look forward to reviewing their testimony and responses. Senator FEINSTEIN. So ordered.

[The prepared statement of Senator Grassley appears as a submission for the record.]

I would like to take this opportunity to introduce the nominee for the Ninth Circuit, and I must tell you, I do not think he has gotten a fair shake. This is the second time he has been nominated. On the Republican side, I regret to say that only one member has sat down with him. I had the privilege of spending several hours with him. My daughter is the presiding judge of the superior court in San Francisco, so I invited him to join us for a family dinner so I could get to know him. And there was substantial legal discussion, and what I found was a very interesting and very talented young man.

Professor Liu is the associate dean of the University of California, Boalt Hall School of Law. He is a highly regarded expert in the field of constitutional law and education law and policy, and a

well-regarded teacher of law at the University of California.

He is a proud husband and father. He is a scholar of formidable intellect who cares deeply about the law and takes great care in formulating his thoughts and ideas. And he is a person with an abiding commitment to public service.

What also comes through in talking with Professor Liu is his deep appreciation for the opportunities our country affords. He is the son of Taiwanese immigrants. His parents came to this country as part of a program that recruited primary care physicians to work in rural areas throughout America. He spent his childhood in Augusta, Georgia; Clewiston, Florida; and Sacramento, California. He attended public schools where, far from having an easy time, he struggled first to read and later to master the English vocabulary. He went on, however, to become co-valedictorian of Rio Americano High School in Sacramento and to attend Stanford University, my alma mater, where he graduated Phi Beta Kappa and was elected co-president of the undergraduate student body. I only made vice president.

He was a Rhodes scholar at Oxford University, and he graduated from Yale Law School, where he was an editor of the Yale Law Journal. He served as a law clerk on the United States Supreme Court to Justice Ruth Bader Ginsburg and on the United States Court of Appeals to Judge David Tatel.

Professor Liu served as a legal and policy adviser in the Department of Education. He also has private practice experience at the prestigious law firm of O'Melveny & Myers, and he now a tenured constitutional law professor and the associate dean of the Boalt Hall School of Law.

Among other accolades, he has received the University of California at Berkeley's highest award for teaching. He has been a legal consultant to the San Francisco Unified School District. He is a recipient of the Education Law Association's Award for Distinguished Scholarship. He is an elected member of the American Law Institute, and he is on the Board of Trustees of Stanford University. As a professor, he has written extensively. His work has been published in prestigious journals such as the Stanford Law Review, the California Law Review, and the Iowa Law Review.

There is no question that some of his written work is thought provoking. As Professor Liu himself said at his last hearing, "The job of law scholars, when they write, largely, I think, is to probe, criticize, invent, and be creative."

Nor is there any question that the role of a judge is quite different from that. Again, in Liu's own words, and I quote, "The role of a judge is to be an impartial, objective, and neutral arbiter of specific cases and controversies that come before him or her, and the way that process works is through absolute fidelity to the applicable precedents and the language of the laws, statutes, regulations that are at issue in the case."

He clearly recognizes that these are very different roles. The question is: Can he make the transition? And I have every confidence that he can.

I would also point out that the Committee has previously confirmed Republican appointees, such as Michael McConnell for the Tenth Circuit, Harvey Wilkinson for the Fourth Circuit, Frank

Easterbrook on the Seventh Circuit, and Kimberly Ann Moore on the Federal Circuit. Moore and Wilkinson were younger at their confirmation than Liu is now and had quite comparable experience, and Michael McConnell's writings were at least equally provocative, but from a conservative point of view. But all of these nominees were confirmed, as I believe Professor Liu deserves to be.

I had one situation and I am going to relay it here. We had a nominee for the Tenth Circuit by the name of Southwick. Democrats were not going to vote for him. I was implored not to vote for him. Trent Lott came to me on the floor of the Senate and said, "Would you at the very least sit down with him and listen to him?" I did, for a long time, more than once. And I reviewed what the allegations were, and I talked with him about them, and I decided I was going to vote for him. And I did vote for him, and he is now sitting on the Tenth Circuit. As a matter of fact, I received a letter from him not too long ago saying how much he appreciated that vote and what it meant to me.

Well, since those days, we have become very polarized, and it is a tragedy because if this kind of thing continues, nobody can break away from the party and vote to approve another party's person. And that would be a real tragedy for this Committee.

For those who would question Goodwin Liu's ability to make the transition, I would refer you to one of the conservatives who has written to the Committee in support of his confirmation, and I would like to call special attention to a letter submitted by Kenneth Starr.

As many here will know, Kenneth Starr is currently the president of Baylor University and has served in the past as a D.C. circuit judge and as Solicitor General of the United States. He was appointed to both positions by Republican Presidents. Here is what he and Professor Akhil Amar wrote about Professor Liu, and I quote: "We recognize that commentators on all sides will be drawn to debate the views that Goodwin has expressed in his writings and speeches. In the end, however, a judge takes an oath to uphold and defend the Constitution. Thus, in our view, the traits that should weigh most heavily in the evaluation of an extraordinarily gifted nominee such as Goodwin Liu are professional integrity and the ability to discharge faithfully an abiding duty to uphold the law. Because Goodwin possesses those qualities to the highest degree, we are confident that he will serve on the Court of Appeals not only fairly and confidently but with great distinction. We support and urge his speedy confirmation."

Now, Professor Liu is a great asset to the faculty to the University of California, and I really believe he will be a superb judge on the Ninth Circuit. It is my hope that for those on this Committee who do not know him, you will take the time to get to know him, sit down with him, ask him questions. But, please, do not turn your backs on a brilliant young man.

So now I would like to ask the nominees to come forward, and we will begin the hearing.

Oh, it is just Goodwin Liu for the first panel, and it is my understanding that you would like to introduce your family. Please proceed.

Mr. LIU. Thank you so much, Senator Feinstein, and thank you for the very generous introduction.

I do have some family members with me here today. Let me begin with my parents, who are seated to my right, Yang-Ching and Wen-Pen Liu. My parents came all the way from Sacramento, California, to be with me here again.

Seated behind me is my wife, my wonderful wife Ann, who has made her share of sacrifices to support me in this process. In her arms is our baby boy Emmett, who last time, you will remember, Senator Feinstein, he slept through the whole thing. Hopefully we will have the same luck today.

[Laughter.]

Mr. LIU. And then seated next to them is my daughter Violet, who turns 4 in a couple weeks. She said she likes coming to these hearings. I said, “Good for you, Violet.”

[Laughter.]

Mr. LIU. So I apologize if there is some sort of back-and-forthing going on, but I think it is nap time for the kids.

I am also very fortunate that my wife’s parents are also here, Pamela Braley and Charles O’Leary, right behind my right shoulder. They came all the way from Orono, Maine, where they have lived for over 40 years.

And I am also joined by a cousin of mine, Sue Liu, who hails from Salt Lake City, Utah, and another cousin, Lillian Tsai, who grew up in the Chicago area.

I would also like to recognize and thank the many friends and former students that I have here today in the hearing room, and also I want to give a special recognition and thanks for the Members of Congress who are here: Judy Chu, Bobby Scott, Doris Matsui, and I am especially honored that Secretary Bill Coleman has joined us. I have often thought a lot about Bill in this process, and he has been a steady guide and mentor to me. So I really appreciate his being here.

Senator FEINSTEIN. Excellent. Would you stand and affirm the oath? Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. LIU. I do.

Senator FEINSTEIN. Thank you very much.

I want to ask you right off the bat about an issue that has caused considerable consternation among Committee members. In 2006, you submitted testimony to this Committee regarding the nomination of now Justice Alito. In your testimony, you criticized a series of his decisions, but the real concern has been with the lengthy hypothetical at the end of your comments. I would like to give you another chance to explain this so that the members hear your response.

STATEMENT OF GOODWIN LIU, NOMINEE TO BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Mr. LIU. Certainly, Senator. I would be happy to address that and thanks for the opportunity.

As you can imagine, Senator Feinstein, I have thought a lot about that testimony in this process, and I would like to acknowledge to you today and to the members of this Committee what I acknowledged last year in a written response to a question from Senator Kyl, and that is that I think that the last paragraph of

that testimony was not an appropriate way to describe Justice Alito as a person or his legal views.

I think the language that I used was unduly harsh, it was provocative, and it was unnecessary because what it was was a summary in shorthand of a few cases from the legal analysis in the pages that preceded that paragraph. And it also seemed to suggest that Justice Alito endorsed certain Government practices as a policy matter, when, in fact, his view was only that those practices did not violate the Constitution.

So I think that I should have omitted that paragraph, and, quite frankly, Senator, I understand now much better than I did then that strong language like that is really not helpful in this process. If I had to do it over again, I would have deleted it, and I just hope, Senator, that you and the other members of the Committee can read that statement in the context of the other parts of my record and hope that the other parts of my record show that I am a more measured and thoughtful person than that single statement in isolation might suggest.

Senator FEINSTEIN. Thank you.

Some have criticized your theory of constitutional fidelity for considering evolving norms and social understandings along with the text, principle, and precedent in interpreting the Constitution. To me, those views are well within our constitutional mainstream.

I think, for example, of Chief Justice John Marshall, who famously said in 1819, “We must never forget that it is a constitution we are expounding. This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.”

Or Oliver Wendell Holmes, who wrote in 1920 that the Constitution “must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.”

Or Sandra Day O’Connor, who wrote in her book “Majesty of Law,” “The Bill of Rights was drafted intentionally in broad sweeping terms, allowing meaning to be developed in response to the changing times and current problems.”

So can you explain to us your theory of constitutional fidelity and how it is similar or different from the points these Justices were making?

Mr. LIU. Yes, certainly, Senator. Let me answer your question by first making very clear that if I were fortunate enough to be confirmed in this process, it would not be my role to bring any particular theory of constitutional interpretation to the job of an intermediate appellate judge. The duty of a circuit judge is to faithfully follow the Supreme Court’s instructions on matters of constitutional interpretation, not any particular theory. And so that is exactly what I would do, is I would apply the applicable precedents to the facts of each case.

But to more directly address your questions about my writings, I would say this: The notion of evolving norms is simply a reference to—it is a way of describing how the Supreme Court has applied some of the text and principles of the Constitution to specific cases and controversies. So in some instances, the Constitution’s text is very clear. For example, Article III says that you need two witnesses to convict someone of treason, not one, so that is pretty

clear. But in other parts of the Constitution, it is not as precise. And so, for example, in 1961, the Court confronted the question of whether a telephone wiretap falls within the ambit of the Fourth Amendment's definition of unreasonable searches or seizures, and the Court grappled with this because up to that point, a physical trespass had been necessary to make out a search under the Fourth Amendment. But the Court in *Katz* in 1961 says we are going to abandon that requirement because there is now a societal expectation of privacy in telephone calls. And this was not just a matter of sort of recognizing new technology. It was a matter of recognizing the social norms that had grown up around using telephones. And so when the book makes reference to evolving norms, it is just a way of describing how references to practices like that get—how they inform the Supreme Court's elaboration of constitutional doctrine.

Senator FEINSTEIN. Thank you very much.

Senator Grassley.

Senator GRASSLEY. Professor Liu, I will take up where the Chairman just left off. You said during your last hearing, "Whatever I may have written in the books and in the articles would have no bearing on my role as a judge." So I want to focus on that comment as it relates to the book you co-authored, "Keeping Faith with the Constitution."

As you say in the book itself, your entire purpose is to propose and defend a theory of constitutional interpretation. So it is a bit difficult for me—to us—how you can now say that it would have no bearing on how you would rule as a judge.

So my first question should be fairly easy, a yes or no. Today do you still stand by your book, "Keeping Faith with the Constitution"?

Mr. LIU. Senator, I do stand by that book as an expression of my views as a scholar, but I recognize at the same time that the role of a scholar is very different than the role of a judge. And so were I confirmed to the Ninth Circuit, I would be adopting the role of the judge, which is not, as I was trying to express, not to follow any particular theory that I might have but, rather, I follow the instructions of the United States Supreme Court on matters of constitutional interpretation.

Senator GRASSLEY. Are there any arguments in that book that today you would disavow?

Mr. LIU. You know, Senator, I have not read through the book again. You know, scholars do consider and reconsider their views. But off the top of my head, I cannot think of any.

Senator GRASSLEY. In the book "Keeping Faith with the Constitution," you termed your judicial philosophy, as the Chairman just said, as one of constitutional fidelity. That phrase sounds nice, but, of course, it only sounds nice until you learn what you mean by it.

In an interview you gave to the American Constitution Society about the book, you explained in more detail your judicial philosophy.

You said, "Our basic thesis is that the way the Constitution has endured is through an ongoing process of interpretation and that, where that interpretation has succeeded, it is because of not in spite of fidelity to our written Constitution."

Continuing to quote, "And what we mean by fidelity is that the

Constitution should be interpreted in ways that adapt its principles and its text to the challenges and conditions of our society in every single generation.”

It seems to me that all you are doing is taking a judicial philosophy that has been largely rejected by the American people and rebranding it into a new label. In your book, you define a living Constitution this way: “On this approach, the Constitution is understood to grow and evolve over time as the conditions need and values of our society change.”

So my question is: How is your definition of a living Constitution different from your theory of constitutional fidelity which you described as interpreting the Constitution in ways that “adapt its principles and its text to the challenges and conditions of our society in every single generation” ?

Mr. LIU. Well, Senator, what we tried to do in the book is actually to reject the notion of the living Constitution insofar as that label has come to stand for the idea that the Constitution itself can sort of grow and evolve and morph into whatever a judge might want it to say, and that is simply wrong. I mean, the Constitution provides in Article V the only process by which the text of the Constitution can change, and we absolutely respect that.

Furthermore, I think the book fully respects the notion that the text of the Constitution and the principles that it expresses are totally fixed and enduring. Those things do not change either.

The challenge, I think, for courts when they confront cases, new cases and new conditions, is how to apply sometimes broad principles to the specific facts of a case, and in terms of this notion of adapting, let me just offer one more example.

Last year, the Supreme Court considered a case called *City of Ontario v. Quon*. It was an interesting case about whether or not a public employee has a reasonable expectation of privacy in text messages that are sent from a Government-issued cell phone. And the Court, interestingly, declined to decide that issue because it observed that the dynamics of communication are changing not just because we have new technology, but really because society’s expectations of privacy with respect to the new technology have not fully settled. And so the Court said that workplace norms are evolving, and that it is not clear yet what kinds of expectations of privacy society is prepared to recognize as reasonable.

And so this is just another example of how it is that—you can call it evolving norms or you can just call it social conditions—inform the Court’s approach to the interpretation of certain constitutional provisions.

Senator GRASSLEY. My time is up.

Madam Chairman, I am going to have to be in and out today, but I intend to return to ask some more questions.

Senator FEINSTEIN. All right. Fine. Thank you.

Here is the early bird order. It is Franken, Lee, Coons, Coburn, Blumenthal, Sessions, and Cornyn. So, Senator Franken, you are up next.

Senator FRANKEN. Thank you, Madam Chair.

Mr. Liu, I had the opportunity to speak to you in my office and read your writings, and I really believe you are one of the finest minds of your generation, and I hope that we as a Nation could be

lucky enough to have you as a jurist and a public servant. What I think is remarkable about your nomination is not its strength but its diversity of support. A lot of people have mentioned Ken Starr's letter supporting your nomination, and I will get to that in a moment. But the one that caught my eye was a lengthy blog post that went up today from University of Minnesota Professor Richard Painter. This guy is a great law professor, and he is no liberal. He worked to support the confirmations of John Roberts and Samuel Alito and served as President George W. Bush's chief ethics officer. And anyone who has any doubts about your nomination should, I think, read this article. So, Madam Chair, with your permission, I ask that the article be entered into the record.

I would ask that Richard Painter, Professor Richard Painter of the University of Minnesota, his blog post today be entered into the record.

Senator FEINSTEIN. So ordered.

Senator FRANKEN. Thank you.

[The information appears as a submission for the record.]

Senator FRANKEN. Let me just read one little thing from it. "Liu's opponents have sought to demonize him as a 'radical,' 'extremist,' and worse....However, for anyone who has actually read Liu's writings or watched his testimony, it's clear that the attacks—filled with polemic, caricature, and hyperbole—reveal very little about this exceptionally qualified, measured, and mainstream nominee." I want everyone to think about that. This is a guy who participated in Samuel Alito's and Chief Justice Roberts' nominations for the Bush administration. And, please, I ask anyone who is considering voting against this nominee to read this blog post, please. I ask my colleagues to do that.

Let us talk about the letter from Kenneth Starr and Akhil Amar. They write, "What we wish to highlight, beyond his obvious intellect and legal talents, is his independence and openness to diverse viewpoints as well as his ability to follow the facts and the law to their logical conclusion, whatever its political valence may be." Professor Amar and Ken Starr cite two examples to support their conclusion, one having to do with Proposition 8. With respect to that episode, they write, "Goodwin knows the difference between what the law is and what he might wish it to be, and he is fully capable and unafraid of discharging the duty to say what the law is."

Can you tell us about the events that led to Kenneth Starr and Professor Amar—what they were referring to?

Mr. LIU. Certainly. Certainly, Senator, and thank you for the generous remarks.

So as I understand it, the letter from Kenneth Starr was referring to testimony that I gave before the State Assembly and Senate Judiciary Committees, the California State committees. What had happened in California was that the California Supreme Court had issued a ruling that had invalidated laws that restricted marriage to a man and a woman. And, thereafter, the voters of California enacted an initiative, Proposition 8, which sought to constitutionalize and did constitutionalize marriage between a man and a woman as the sole definition of marriage in California.

Anticipating a legal challenge to that initiative under State law, the Assembly and Senate Judiciary Committees held a hearing in which they invited me to testify as a neutral legal expert to assess the merits of the claims that many proponents of invalidating Prop. 8 were making, that it was an improper amendment of the Constitution under the procedures prescribed by the Constitution. And I testified that Prop. 8 should be upheld under the applicable precedents that were in existence at the time.

I did also write that the Supreme Court, California Supreme Court, might have some reasons for revisiting that precedent, but under the applicable precedent it was a straightforward case—straightforward in the sense that Prop. 8 should be upheld and this was not, I suppose, a popular position with some of the advocates. But it was, I think, a correct reading of the law, and the California Supreme Court ultimately agreed.

Senator FRANKEN. Thank you. My time is up.

Thank you, Madam Chair.

Senator FEINSTEIN. Thank you very much, Senator Franken.

Senator Lee, you are up next.

Senator LEE. Thank you, and thank you, Professor Liu, for coming and bringing your family to join to us today.

I would like to start out by talking a little bit about the Commerce Clause. On page 72 of your book, “Keeping Faith with the Constitution,” you wrote as follows: “The Court has declared certain subjects off limits to Federal regulation by attempting to draw a line between economic and non-economic activity”—referring presumably to the Lopez and Morrison line of cases—“a line that looks much like the old distinction between what directly affects commerce and what touches it only indirectly in its incoherence and inefficacy in advancing federalism values.”

If the distinction drawn by the Lopez and Morrison cases and the standard established by those cases is ineffective and incoherent, is this something that you could and would employ as a judge?

Mr. LIU. Senator, as with all of the Supreme Court’s precedents, absolutely. I mean, I would faithfully apply that standard under the guidance and instruction of the Supreme Court.

Senator LEE. But what if it is incoherent? Then what do you do?

Mr. LIU. Well, Senator, I think the Court actually grappled with that very issue in the subsequent case, the Gonzales v. Raich case, where they were posed with, I think, a similar characterization issue as to whether or not marijuana grown and used for medicinal purposes purely within local boundaries qualified as a kind of activity that could be reached under the Commerce Clause. And there I think the Court made an accommodation. It said that though this is non-economic activity, it belongs to a class of economic activity. And so I am not sure exactly where that leaves us, but the rule that emerges from Raich seems to be that non-economic activity that belongs to a class of economic activity is reachable under the Commerce Clause.

And so I think that the only point of the book was to suggest that definitionally these things, like all distinctions in the law, when you press very hard on them, there are gray edges on the distinctions. But in the main, I think these are workable in the role that I would be filling if I were confirmed.

Senator LEE. In the wake of *Gonzales v. Raich*, and setting aside for a moment the exceptions identified in *Lopez* and *Morrison*, can you identify limits on Federal authority that exist outside of *Lopez* and *Morrison*?

Mr. LIU. Well, Senator, it would be difficult for me to present a hypothetical given that one never knows when an issue will actually be litigated. But let me try to answer your question by saying that my own understanding of this area begins with one basic supposition, which is that the Federal Government is a Government of limited power. The very enumeration of Congress' powers in Article I presupposes that there is that limit, and the Tenth Amendment to the Constitution makes that explicit. It says that all "powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States, respectively, or to the people." And from Madison to Hamilton to the precedents of the Court that followed, every one of these sources confirms that basic proposition.

And so any judge that approached a Commerce Clause question would have to yield an answer to a problem that was consistent with that fundamental bedrock proposition of our system.

Senator LEE. Getting back to your statement that the distinction between economic and non-economic is drawn in *Lopez* and *Morrison* is ineffective and inefficient, is there some other way that you could have reached the same result in those cases without drawing the economic/non-economic distinction, either as to bear non-commercial gun possessions at issue in *Lopez* or acts of violence at issue in *Morrison*?

Mr. LIU. Well, I think actually the opinions themselves provide some guide to that. As I recall, the *Lopez* case just simply did not indulge what it said was the sort of piling inference upon inference in applying the substantial effects test of the doctrine. So one way to read *Lopez*, I suppose, is to say that the Court is simply unwilling to, you know, develop a chain of reasoning from mere possession of an article of commerce, to be sure—but the mere possession itself is non-economic—to the economic effects that were posited by the dissent. And that was simply too distant in the chain of, you know, linkages to get to a substantial effect.

Senator LEE. In a 2008 *Stanford Law Review* article, you wrote, "The problem for courts is to determine at the moment of decision whether our collective values on a given issue have converged to a degree that they can be persuasively crystallized and credibly absorbed into the legal doctrine."

Can you tell me how a judge discerns when, whether, to what extent a particular value has been persuasively crystallized so as to become part of our law?

Mr. LIU. Well, Senator, I think that—in some sense, I think that that is a kind of—what I wrote there is an unremarkable observation about the way the Supreme Court elaborates doctrine. So just to go back to the Fourth Amendment examples I was providing earlier to Senator Feinstein, what constitutes a reasonable expectation of privacy? Well, the Court undertakes, I think, an objective analysis. It does not ask what they themselves think is a reasonable expectation. They ask what society thinks. And I think that the cases are very clear that the inquiry is whether society has developed

a legitimate or recognizes a legitimate or reasonable expectation. And I think they look to whatever indicators that they can in the practices—in the case of the text messaging I was describing, they looked to certain practices of employers and the expectations of the employees. And they may look to the case law as it has developed in the State courts and the Federal courts.

And so this happens, I think, all over the constitutional jurisprudence as elaborated by the Supreme Court, and so I think this is in some sense kind of a banal observation about the way the Court elaborates doctrine.

Senator LEE. I see my time has expired, so we may be able to get back to that later.

Mr. LIU. Thank you.

Senator FEINSTEIN. Thank you very much, Senator Lee.

Senator Coons.

Senator COONS. Thank you, Professor Liu, for being with us today and for your, I think, remarkable record of public service, your outstanding academic preparation, and your family's willingness to stand by you through this, I know, long process. And I am grateful for the chance to have visited with you in person, have reviewed your writings and your work, and to spend time with you in this hearing today. I think you would be a very capable jurist, and we would be blessed to have you join the Ninth Circuit. But I know there are a lot of questions that have been raised about some of your writing as an academic and then how that would or would not influence your work should you become a circuit court judge.

One article in particular, a law review article entitled "Rethinking Constitutional Welfare Rights," has been the subject of some controversy, and in that you wrote that fundamental rights can evolve over time. Could you just lay out for me what role you believe the judiciary has in evolving or recognizing the evolution of fundamental rights over time?

Mr. LIU. Certainly. That article, I think, was really an article in two parts. The first half of the article is devoted to rejecting the idea that courts have really any role in inventing rights in the social and economic realm, and that is very consistent with the instructions of the Supreme Court in this area where in case after case the Supreme Court has said that our Constitution is a charter of negative liberties and not one of positive liberties, and I would faithfully and fully apply those precedents were I confirmed in this process.

The back half of the article does recognize a limited judicial role in interpreting rights that are created by statute, so this is a crucial difference that much of the article is actually directed at the notion that policymakers are really the ones in charge when it comes to this contested area, and that what courts do is on occasion, on limited occasion, they assess the legislature's—they assess eligibility requirements or termination procedures against the dictates of the Equal Protection or Due Process Clauses. And that judicial role, too, is supported by precedent, and those precedents remain on the books. And so the role that I propose I think is fully consistent with the state of the law as it is today. And I feel prepared to fully follow that law if I were confirmed as a judge.

Senator COONS. And can you point to anything else in your scholarship to suggest that this has consistently been your view that the role of the judiciary in recognizing the evolution of rights is fairly limited and in many ways really subservient to the policymaking or the legislative role?

Mr. LIU. Absolutely. I mean, in many ways, Senator Coons, my scholarship has been devoted to the subject of education, public education, as you know, and in another article in the Yale Law Journal from 2006, I wrote, again, another piece that was about education, but directed again at the legislature, the policymakers, with the important caveats in the front of the article that said that I am not contemplating any particular judicial role here. And, in fact, I acknowledged that the Supreme Court's decision in 1973 in the Rodriguez case that was very much informed by principles of judicial restraint was the basic approach that I was taking in that article, recognizing that courts have very, very limited capacity, in some instances no capacity, and no authority to wade into what are essentially political decisions. And so much of my writing has been centered on those very premises.

Senator COONS. Let me ask, if I could, one last question, Professor, about something else that has been the subject of some debate. What role, in your view, does foreign law play in any judicial interpretation or application of domestic U.S. law? What sort of authority, if any kind, does it have?

Mr. LIU. The answer is none, Senator. Foreign law has no authority in our system unless American law requires it to have authority, so in the case of a contract or treaty of some sort. To clarify that issue, there is one paragraph of writing in my record that acknowledges that solutions for legal problems might come from other places in the world when they are common problems that constitutional democracies face. But I think all I meant by saying that was in the same way that judges look to treatises and law review articles and other sources for ideas about how to approach matters that come before them, they might look to examples from other nations, too, but there is a crucial distinction between that kind of information gathering, to the extent it is even informative, and the use of those sources as authority. No one would ever cite a law review article as legal authority that controls a certain proposition of law, and I think the same exact rule applies to any foreign precedent or foreign law that a judge might look to.

Senator COONS. Thank you.

Senator FEINSTEIN. Thank you very much, Senator Coons.

Senator Coburn.

Senator COBURN. Thank you, Madam Chairman.

At the recommendation of our Chairman today, I would like to invite you to come by my office and have a sit-down at your convenience before you are considered before the Committee. I promised the Chairman that I would do that when your nomination was discussed in the lame duck.

Earlier today, you said in your testimony that there are areas of the Constitution that are very precise, so I have a question for you. Article III, Section 2, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of

the United States, and Treaties made, or which shall be made under their Authority.’’ Is that precise to you?

Mr. LIU. Well, Senator——

Senator COBURN. Because the idea of preciseness is an important definition here for me.

Mr. LIU. Certainly. I mean, I think that Article III, Section 2 contains with it an absolute requirement that judges decide only cases or controversies and that they do not render advisory opinions. I think that is fairly explicit in the text of the Constitution, the provision you read.

Senator COBURN. Well, the reason I ask that question, the Chairman quoted you in terms of your statement, absolute fidelity to the law, the language, and the statutes. And your statement that has caused difficulty is the following: ‘‘The resistance to this practice’’—in terms of referencing foreign law—‘‘is difficult for me to grasp’’—I mean, these are your words—‘‘since the United States can hardly claim to have a monopoly on wise solutions to common legal problems faced by constitutional democracies around the world.’’

If you have an absolute fidelity to the law, the language, and the statutes, and this is precise, how could anyone ever consider foreign law as a basis for a decision sitting on the Supreme Court or an appellate court?

Mr. LIU. Well, Senator, the Supreme Court in this area I think has largely followed the general approach that they have looked to foreign law merely as confirmatory or for ideas about how to approach a particular problem. I do not read the precedents as dictating that those sources have authority in the sense of legal, controlling, and binding authority in the interpretation of U.S. law, and it is certainly not my view that foreign law has that kind of authority.

Senator COBURN. All right. Let me give you a specific example then. Justice Stevens in *McDonald v. Chicago*, ‘‘The fact that our oldest allies have almost uniformly found it appropriate to regulate firearms extensively tends to weaken petitioners’ submission that the right to possess a gun of one’s choosing is fundamental to a life of liberty.’’

Do you believe that there is merit to his argument? I mean, he is now referencing foreign law in his defense of his position on that case. Is that fidelity to the language, law, and statutes? And is this precise?

Mr. LIU. Well, Senator, as I recall, Justice Stevens was in dissent in that case, and were I confirmed as a judge, I would follow the majority view.

Senator COBURN. I know. But, again, we have a Supreme Court Justice who is relying on foreign law, so it is very clear to this Senator to want to know exactly where you are given the statement that you said, that it is difficult for you to grasp that people would have trouble with the utilization of foreign law?

Mr. LIU. Well, Senator, even in Justice Stevens’ dissent, if I can recall it correctly, there is no sense in which the examples he gave—and I do not have any view, because I cannot recall it very clearly, of the merits of how he used his examples. But my point simply is I do not think that even in his opinion that he is citing those sources is in any way dispositive of the legal question that

came before him. And as I said, Senator, that opinion was a dissent, and if I were confirmed as a judge, I would follow not only the holding of the Supreme Court in *McDonald v. City of Chicago*, but one would have to absolutely follow the reasoning of the case, and that reasoning I think is dispositive.

Senator COBURN. I submitted two rounds of questions to you following our other hearing, and on many you failed to give me an answer. And I am going to run out of time, and I am going to run out of time in this hearing, to be able to do that, so I look forward to meeting with you in my office to try to get to those answers.

The other question I want to go back to is your statements about Justice Alito. You have said today that you would not—knowing what you know today and the experience that you have seen today, that you would not have included the last paragraph in your critique. Is that a case of poor judgment, do you think? Or is just a

case of lack of knowledge and insight?

Mr. LIU. Senator, it was poor judgment.

Senator COBURN. Okay. Madam Chairman, I have 7 seconds left, and I have a multitude of questions, so I will try to accomplish that with the nominee in my office.

Senator FEINSTEIN. Well, thank you, and thank you very much for meeting with him. It is very much appreciated.

Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Madam Chairman. And thank you, Professor Liu, and most particularly to your family, for being here today. I want to commend you for the success so far in your career. Really a great American success story, going to public school in Sacramento, then to Stanford, to Oxford on a Rhodes scholarship, and then to Yale Law School, and many years of teaching, and for answering the questions today, difficult questions, so candidly and forthrightly, most especially your expression of regret for some of the comments you made about then nominee Judge Alito.

I want to say about this process that I think that you are entitled to an up-or-down vote by the U.S. Senate. But I also feel that this scrutiny has been fair, it has been searching and demanding, but I believe that this body has a responsibility to ask the kind of questions that you have been asked, and I hope that you agree that the process is a fair one in that regard.

I want to really go to what I consider to be the central question for any judge on the United States Court of Appeals, which is where you would follow, and particularly what you would follow, if your personal views, whether in your past writings or your present deeply held beliefs, conflict with the rulings and decisions of the United States Supreme Court. Is there any doubt in your mind that you would follow faithfully and consistently the rulings and the decisions of the United States Supreme Court?

Mr. LIU. Senator, there is no doubt in my mind about that, and, in fact, I would add that the approach that I have taken in my writings has been fairly consistently to acknowledge what the state of the law actually is, and then, of course, scholars are paid to critique it and to say other things about it. But it always begins with a clear acknowledgment of what the law is, and so that is what I would follow.

Senator BLUMENTHAL. And so, for example, on the question of school choice and busing, I know that you have taken some stands that would indicate your support for a broad-based school choice initiative under some circumstances, and we may disagree about it. I am not sure we do, but even if we did, there is no question in your mind, even as a supporter, for example, of school choice initiatives, school vouchers, that you would follow the rulings of the United States Supreme Court.

Mr. LIU. Absolutely I would, Senator.

Senator BLUMENTHAL. And to follow what I think is really an excellent line of questioning from Senator Lee, if the United States Supreme Court were unclear—and I think he may have used the word “incoherent,” which sometimes litigators regard the United States Supreme Court as being on certain issues—what would be your approach there? Would you also look to what the combination of precedents from the United States Supreme Court is and try to make the best sense of it and apply it as you saw it?

Mr. LIU. That is exactly what one would do and what one would have to do in the role of an intermediate appellate judge.

Senator BLUMENTHAL. And I know that one of the criticisms I have seen, having reviewed your previous testimony, has related to racial quotas. I think the statement has been made that you support racial quotas with no foreseeable endpoint. Just so we are clear, do you support racial quotas? And have you ever supported them?

Mr. LIU. I absolutely do not, Senator.

Senator BLUMENTHAL. And do you think that affirmative action plans should exist forever?

Mr. LIU. No, I do not, Senator. I think affirmative action, as it was originally conceived, it was a time-limited remedy for past wrongs, and I think that is the appropriate way to understand what affirmative action is.

Senator BLUMENTHAL. Thank you very much. My time has expired. I may have some additional questions, but, again, I want to thank you for your testimony. I am greatly impressed by it and wish you well.

Thank you.

Mr. LIU. Thank you.

Senator FEINSTEIN. Thank you, Senator Blumenthal.

Senator Sessions.

Senator SESSIONS. Thank you, Madam Chairman.

Mr. Liu, we really do not have time to go into the kind of discussions I guess we would all like to. It is awfully difficult as Senators for us to get as prepared as we would like. I think we do a pretty good job all in all.

You have gone through this before. You have answered written questions before. I just want to note that you have had no real experience practicing law or as a judge, only 2 years in private practice arguing one case, I think, on appeal, a pro bono case, but never having tried a case before a jury. You are apparently an able professor, well liked, and have advanced in the academic world.

I do believe that is a serious defect—I mean, a serious lack, at least, in any judge who goes on a court one step below the Supreme Court. So that to me is a serious matter. There is no need, I guess,

to argue about it or talk about it, but it is something I have to weigh in my judgment as to whether or not you should be on the court.

Second, from your writings—and I have been on this Committee now 14 years—I consider them to be the most advanced statement of the activist judicial philosophy that I have seen. I do not think there is anyone close to that. And I think it is a little bit a demonstration of some lack of sensitivity or maybe deep practical legal experience that you have no difficulty in talking around rather direct contradictions in your writings and the positions you are taking here in the Committee on some of the questions. I think they are very clear distinctions, and I do not think they are easily breached.

With regard to the foreign law question, you suggest that yours is not an unusual view, or I would just suggest it is clearly—from the statement the Senator read, it is clearly in accord with the most aggressive foreign law citation theories and I think are unacceptable. In your Yale Law Journal article of 2006, you wrote—you might just put that up. “Before the Fourteenth Amendment mandates equal protection, it guarantees national citizenship. This guarantee is affirmatively declared. It is not merely protected against state abridgment. Moreover, the guarantee does more than designate a legal status. Together with Section 5, it obligates the national government to secure the full membership, effective participation, equal dignity of all citizens in the national community. This obligation, I argue, encompasses a legislative duty to ensure that all children have adequate educational opportunity for equal citizenship. For familiar reasons, the constitutional guarantee of a national citizenship has never realized its potential to be a generative source of substantive rights.”

Well, that is what it says. The words are pretty plain. You become a citizen of the United States, but to become generative of source of substantive rights to me takes that quite a bit further, and it basically says a judge using those words can begin to evaluate political, social policies, as you discuss in your article, and begin to make decisions on those, because you are talking about substantive rights to be found in the document itself, in that clause, that judges can act upon.

I will ask you to respond to that as to whether don't you think that is untethering a judge from the other restraints of the Constitution?

Mr. LIU. Senator, if I may, I will try to address this in four points.

First, the article says absolutely nothing about what a judge should do. The article is addressed to policymakers, and there is not a single sentence in that article that says that judges should use that language as a generative source of rights.

Second, the article acknowledges——

Senator SESSIONS. Well, who would find within that document a source of substantive rights? Legislatures do not need to use the Citizenship Clause to pass a welfare bill.

Mr. LIU. Senator, my argument in the article is merely that the legislature, Members of Congress, may—not that they have to, but that they may——

Senator SESSIONS. No, no, no. You said that constitutional provision

provides—is a potential source of substantive rights, and I think that is clearly directed to the courts.

Mr. LIU. Senator, no, that is not my view, and I think the article in the very beginning explains very clearly that I avoid using the language of rights precisely because rights connote judicial enforceability, which is something that I am not interested in in that article.

But if I may, Senator, make a couple more points.

It is a bit hard for me to respond to—you mentioned that there were contradictions between my record and my testimony. If there are specific instances of that, I would be happy to try to clarify that. But it is hard for me to respond to that in the abstract.

And, last, Senator——

Senator SESSIONS. I am just telling you, I have to vote. You know, I am sort of a judge here. You know, we go through this, and I have to evaluate what I am hearing. And I just would suggest to you that there are a number of contradictions in your written statements and in your testimony and written answers to the Committee's questions that I do not think adequately address the differences.

Mr. LIU. Well, Senator, it is hard for me to respond without knowing what contradictions you have in mind.

Senator SESSIONS. All right.

Mr. LIU. But the last point I would simply make is that in terms of the gaps in my experience, I acknowledge, Senator, you are correct. It is true my resume is primarily a scholarly resume. I have spent a couple years in practice under the tutelage of the likes of people like Bill Coleman, which I hope is a credit to me, but it is limited.

I do think, though, that I do bring other strengths to the role of an appellate judge. I think the role of a scholar has always been one of rigorous inquiry and the consideration, the fair consideration of arguments and counter-arguments, and the ability to listen well to all the different sides of an issue. And in terms of how I would approach the role, knowing that I have some gaps in my experience, I take some instruction from my own experience, having clerked for an appellate judge who was not on the district court before. And one thing that he always did was he always read the record of the case very, very carefully. And I think that, you know, the temptation at the appellate level, because the issues are kind of cleaned up and neat, is to just decide them as abstract matters of law. But the instruction, I think, always was to look at the record, look at the record, look at the record, because it is important to understand how a case came up the line to the appeals process. And I think I would adopt the same approach if I were fortunate enough to be confirmed.

Senator SESSIONS. Well, just briefly, Madam Chairman, in that same article—you say that it was directed only to policymakers—you use this language. You said, in your words, that the article was an attempt, “a small step toward ‘reformation of thought’ on how welfare rights may be recognized through constitutional adjudication”——

Mr. LIU. Senator——

Senator SESSIONS [continuing].—“in a democratic society.”

Mr. LIU. I am sorry for interrupting. There are two different articles in question. The quote you are now reading is from a 2008 Stanford Law Review article. The article you had referenced previously,

the one that contained the phrase “legislative duty,” was from a 2006 Yale Law Journal article. And in that article there is not any reference made to a judicial role.

Senator SESSIONS. Well, it is because you say it is a source, potential source to generate substantive rights, and that can only mean by a judge, because the legislature cannot act on these matters without having to have the Citizenship Clause of the Constitution to authorize it.

I am over my time, Madam Chairman. Thank you.

Senator FEINSTEIN. Note the generosity of the Chairman.

[Laughter.]

Senator SESSIONS. You were very generous.

Senator FEINSTEIN. You are welcome.

Senator SESSIONS. And I would say you are a most able advocate for the judges from California that you believe in, and I always respect your insight. Thank you.

Senator FEINSTEIN. I wish it did some good.

[Laughter.]

Senator FEINSTEIN. Senator Cornyn.

Senator CORNYN. Thank you, Madam Chairman.

Let me go back, Professor Liu, to the statements that were referred to earlier that were the subject of your commentary about Judge Alito, and just to read those for the record because I think it helps people understand both what you said and why there is concern about it.

You said, “Judge Alito’s record envisions an America where police may shoot and kill an unarmed boy to stop him from running away with a stolen purse; where Federal agents may point guns at ordinary citizens during a raid, even after no sign of resistance; where the FBI may install a camera where you sleep on the promise that it will not turn it on unless an informant is in the room; where a black man may be sentenced to death by an all-white jury for killing a white man, absent multiple regression analyses showing discrimination; and where police may search what a warrant permits and then some. This is not the America we know, nor is this the America we aspire to be.”

Did I read that correctly?

Mr. LIU. You did, Senator.

Senator CORNYN. Professor Liu, this is the second time you have had a nomination hearing before this Committee, correct? The last time I believe it was April 6, 2010.

Mr. LIU. I cannot remember the exact date, Senator, but it was in April.

Senator CORNYN. I think it is thereabout. Do you know why your nomination was never called up on the floor of the Senate?

Mr. LIU. Senator, I have read various press accounts of it, but I have no direct knowledge.

Senator CORNYN. Well, you are aware that under the Senate rules, the only person who could do that would be the Majority Leader, Senator Reid.

Mr. LIU. I think I am aware of that, yes, Senator.

Senator CORNYN. Have you had a conversation with him or his staff about why he did not call your nomination up and have a vote on the U.S. Senate on your nomination before it lapsed at the end

of the last Congress?

Mr. LIU. No. Not on that subject, no.

Senator CORNYN. So it is a mystery to you as to why you are having to go through this twice, and you never had an opportunity for a vote on your previous nomination.

Mr. LIU. Well, Senator, I would not perhaps say “mystery.” I mean, I have read some press accounts of how vote decisions were determined in the end of the session. As I have learned through this process, one cannot always trust press accounts, but I do have some ideas about it.

Senator CORNYN. Well, you were denied a vote on your nomination last Congress, correct?

Mr. LIU. I was, Senator.

Senator CORNYN. And the only one who could have scheduled that for a vote would have been the Majority Leader, Senator Reid, correct?

Mr. LIU. I believe that is true, yes.

Senator CORNYN. Professor Liu, you said in talking about Chief Justice John Roberts’ nomination to the Supreme Court, you said, “There is no doubt that Roberts has a brilliant legal mind, but a Supreme Court nominee must be evaluated on more than legal intellect.” Is that a correct quote?

Mr. LIU. It is a correct quote?

Senator CORNYN. And you would agree that that should apply to you as well?

Mr. LIU. Absolutely, Senator. I think that the advise and consent process is in the Constitution because it is one of the checks and balances in our system, that before any judge assumes the bench for life tenure, that there ought to be a political check on that process. And so, yes, I do agree with that.

Senator CORNYN. Well, Professor Liu, the difficulty, I think, that you are encountering with some of the members of the Committee is because you have such a comprehensive set of legal writings expressing opinions on everything from the death penalty to same-sex marriage to what constitutes welfare rights protected by the U.S. Constitution and the like. You are now saying, “Wipe the slate clean because none of that has any relevance whatsoever to how I would conduct myself as a judge if confirmed by the Senate.” Is that correct?

Mr. LIU. That is correct, Senator, because my understanding of the role of an intermediate appellate judge in the hierarchy of the judicial system is to faithfully follow the instructions of the higher court, which in this case is the United States Supreme Court, as well as, I should add, circuit precedent. And so I am very comfortable and confident saying to you, Senator, that my scholarly views are not the ground on which I would base decisions if I were lucky enough to be confirmed.

It is a different case, however—you mentioned what I wrote about the Roberts’ nomination. It is a different case, obviously, with respect to the United States Supreme Court because there the Justices applying the doctrine of stare decisis may, if they apply the test in that way, overturn precedent. And that is simply not something that an intermediate appellate judge has any authority to do.

Senator CORNYN. Well, Professor Liu, as I believe I said at your last nomination hearing, I believe that you have led a remarkable life, and you have accomplished a lot. You have a beautiful and supportive family, and you have a lot to be grateful for, and I know you are. But that does not mean you are qualified to serve as a member of the Federal judiciary, and, in fact, your writings and your previous testimony and the statements, some of which you now say represented bad judgment on your part with regard to Judge Alito during previous confirmation hearings, raise some serious questions about whether you have the sort of temperament and the ability to set aside your strongly held academic and scholarly views and to be able to basically start over from scratch and ignore them.

The problem we have as members of this Committee is that we have 5-minute rounds to ask you questions. We follow it up with written questions, and you have answered most of those, I believe. The difficulty is we know this kabuki theater sometimes where nominees come into the hearing room and they profess a nomination conversion—in other words, that their previous strongly held and very articulately stated views are inoperative, and we should not pay any attention to them, and we should take at your word your ability—maybe it is your hope, maybe it is your aspiration, but we need to know whether you have the ability and you actually will, if confirmed as a judge, do as you say you would do and set all of this aside and decide based strictly on the matter of precedent and fidelity to the Constitution itself.

We have had the sad experience just in the short time I have been in the Senate where people come in and they say the sorts of things that you are saying today about how they would conduct themselves as a judge, but in practice they have either been unable or unwilling to keep that promise. And the Senate has no recourse whatsoever short of impeachment, which, as you know, is extraordinarily rare.

So I just want to explain to you—I think we owe you, in fairness, our candid views, my candid views. As I said, I think you have accomplished a lot in your life. You have a lot to be grateful for and proud of, but I am not convinced that this is the right job for you. So with that, Madam Chairman, I will thank you.

Senator FEINSTEIN. Thank you very much.

Before recognizing Senator Klobuchar, I would like to place in the record the statement of our Chairman, Pat Leahy, and he, too, refers, Senator, to the confirmation of Professor McConnell. I would like just to quote one thing.

“Professor McConnell’s own provocative writings included staunch advocacy for reexamining the First Amendment Free Exercise Clause and the Establishment Clause jurisprudence. He had expressed strong opposition to *Roe v. Wade* and to the clinic access law, and he had testified before Congress that he believed the Violence Against Women Act was unconstitutional. [His] writings on the actions of Federal District Court Judge John Sprizzo in acquitting abortion protesters could not be read as anything other than praise for the extra-legal behavior of both the defendants and the judge.”

And he was confirmed, and members on this side gave him the

benefit of the doubt.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

Senator CORNYN. Well, Madam Chairman, I appreciate that, and I do not dispute anything you said, and I do believe Judge McConnell did what he promised to do. My only point is there is no recourse for the Committee or for the Senate voting to confirm a nominee who does not do what they promised to do. And so that is the quandary we find ourselves in.

Senator FEINSTEIN. Well, I do not want to have a back-and-forth, but Professor Liu can promise, but he cannot do now. He can only once get appointed and then you measure that. There is no way of—he has said he would.

Senator CORNYN. And, again, thank you for allowing me to just briefly respond. We have had the experience in the case of a Supreme Court Justice who came in and in the case of the Second Amendment and the right to keep and bear arms said it was an individual right, and then subsequently wrote a decision on the Court and disavowed the very individual right that she claimed that existed under the Second Amendment. That is my only point. I am not disputing that Professor Liu may have those aspirations. He may be making a good-faith representation about his intentions. I am just saying that you cannot ignore a body of legal scholarship and writing like this expressing strongly held views about this and just take for granted that someone will be able to completely ignore that in approaching their job as a judge. That is my only point.

Thank you.

Senator FEINSTEIN. I will continue this discussion with you sometime.

Senator CORNYN. I am sure you will.

[Laughter.]

Senator FEINSTEIN. Senator Klobuchar.

Senator KLOBUCHAR. Well, hello, Professor Liu. Welcome back.

Mr. LIU. Thank you.

Senator KLOBUCHAR. I think this is your second hearing. is that right?

Mr. LIU. Yes, it is.

Senator KLOBUCHAR. I remember talking with you then, and I was listening as Senator Cornyn spoke about these 5-minute rounds. You have had two hearings now, and you have also made yourself available to members for whatever questions that they have to meet with them in their office. Is that right?

Mr. LIU. That is true, yes.

Senator KLOBUCHAR. Well, I appreciate you making yourself so available to talk with them about any questions that they have about your ability to do this job. And I have stated before, using the Lindsey Graham standard, that I think you are more than qualified to do this job based on your background, the standard that he expressed during the Kagan and Sotomayor hearings about someone's qualities and their academic qualifications and their understanding of the law and their willingness to follow the law.

I just wanted to go back into what Senator Cornyn was just talking about, which is the difference of you work as a scholar, and I think I mentioned before that I am a graduate of the University

of Chicago Law School and have seen Judge Easterbrook and Judge Posner as professors and have often thought that some of the things that they said in class or views that they expressed in scholarly journals were not necessarily what guided them as a judge when they actually had to apply the law.

Could you talk a little bit again about your view of a judge differing from the role of an advocate or scholar?

Mr. LIU. Certainly. Thank you, Senator Klobuchar.

I first want to just express that I appreciate Senator Cornyn's making transparent and plain his concerns about my nomination, and I think they are fair concerns to raise and discuss. I think this is a robust and fair process. And it enables me an opportunity, I think, to clarify that in all of my academic writings, the role that I had was that of a commentator, as it were. What a scholar does is a scholar pokes and prods and critiques. A scholar does not make much headway in the law schools by simply restating the law. And so that is why scholarship comes out the way it does. It comes out as critical, and it comes out as inventive and provocative. In fact, those are the very qualities that are rewarded in that profession. The role of the judge is very, very different. The role of the judge is fundamentally one of being faithful to the law as it is. And I think I recognize that difference in the way I approach scholarship, which is to say that I understand what the law is first. Without grasping that essential foundation, one cannot responsibly comment on it.

And so if I am able to take one hat off and put a different hat on, the role simply changes and the nature of how you approach cases changes. It is not that Judge Easterbrook or Judge Posner or any judge who has been an academic consults their own legal writings and refreshes their recollection about what they thought as a matter of theory before deciding a case. No. What they do is they read the briefs and they read the record of the case, and they confine themselves, they discipline themselves to that process because that is the process of judging.

So that is how I understand that difference, and that is how I would approach the job.

Senator KLOBUCHAR. And I also know that there have been a lot of comments about writings and taking certain things you have said to try to demonstrate what people think might be your judicial philosophy. Do you want to describe in your own words, without just taking one sentence out of something you wrote, what your judicial philosophy is?

Mr. LIU. Sure. My judicial philosophy in a nutshell, I think, is that the courts of the United States have a very limited role in our system of Government. It is limited because the members of the judiciary hold life tenure without electoral accountability, and they are asked to review the substantive validity of democratically enacted statutes on occasion. And so that is—because we are fundamentally a democratic system, that is a role to be exercised very cautiously and in a very restrained way.

It is also, however, a very important role because the judiciary, as Hamilton told us long ago, is also an important bulwark against the tyranny of the majority. And so we have protections in the Constitution for various individual rights, and we entrust the judiciary

to enforce it precisely because they are insulated from the politics of the moment.

And so it is a careful balancing act at all times, but in approaching the cases that would come before me, I would take my instruction from the United States Supreme Court in all of those cases, and I think the Court has in the main across the broad run of cases balanced those two important prerogatives—one, the limitations of the judiciary; and, second, the important bulwark against tyranny that the judiciary serves in our system of Government.

Senator KLOBUCHAR. Thank you.

Madam Chair, if I could ask one more question, I have been managing the America Invents Act, as you know, so I missed the first round here.

I wondered what you see in my job here, as I am going to be heading up the Courts Subcommittee, and Senator Sessions is the ranking Republican. But just generally what do you see as the greatest challenges facing the Federal judiciary right now?

Mr. LIU. Well, I feel like it would be presumptuous of me even to comment on that question, having not made it to the job yet.

Senator KLOBUCHAR. You have been trying really hard, though, so you must have some thoughts on it.

Mr. LIU. You know, Senator Klobuchar, I do not have more thoughts on this than any lay person might have. I mean, I have paid attention to this process, obviously, because of my own involvement in it, and obviously I have observed many claims made about the crushing caseloads that have affected not just the Ninth Circuit but many of the circuits around the country. And so, you know, that attests, I think, the importance of this process, and some of the challenges that you will face in the years to come.

Senator KLOBUCHAR. Well, thank you very much, and, again, I just think about myself as a student in law school with Professor Easterbrook and Professor Posner, and somehow they go through this Committee and they got through the Senate, which had very ideological—many differences at that time as well, and I hope that the same will happen with you, Professor Liu. You have great credentials. Thank you.

Mr. LIU. Thank you, Senator.

Senator FEINSTEIN. Thank you very much. That completes our first round, and I would like to put some letters into the record, which I will do.

[The letters follow:]

Senator FEINSTEIN. I understand that Senator Sessions has some questions he wishes—this is actually your third round. Why don't you go ahead?

Senator SESSIONS. Mr. Liu, again, I am a bit baffled. You talked just a moment ago about judges showing restraint, that they are cautious, that they have a limited role. But I improperly quoted this article a while ago, and you corrected me, rightly. But this is the article on “Rethinking Constitutional Welfare.” You talked about judges—and this is your writing about how you think judges should perform. “The historical development and binding character about constitutional understanding demand more complex explanations than a conventional account of the courts as independent, socially detached decisionmakers that say what the law is. The enduring

task of the judiciary,” you say, “is to find a way to articulate constitutional law that the Nation can accept as its own.”

Well, first, I think the *Marbury v. Madison* decision had the famous line that a judge’s role is to say what the law is. But you go quite a bit further from that in your writings, and then when asked about it, you give a statement that Justice Scalia could give about the role of a judge.

So I guess you—doesn’t this go far beyond what you just said?

Mr. LIU. Senator, I think that is the first time I have been accused of channeling Justice Scalia, so I will take that——

[Laughter.]

Senator SESSIONS. Well, that was a pretty good statement.

Mr. LIU. Thank you, Senator.

Senator SESSIONS. But it is not consistent, I think, with what you wrote.

Mr. LIU. Well, Senator, I do not recall—I would be happy to look at that passage a little more carefully, if you would like.

Senator SESSIONS. Well, I did not misquote it, I do not think.

Mr. LIU. I think you quoted it accurately. I think the passage, if I recall it correct, was trying to say that judges cannot decide cases, whether it is in this area, welfare rights, or any other area, on the basis of some independent moral theory that they have about what people are entitled to, if anything. And so that statement is part of an argument I think in the article that says that what judges have to do is they have to set aside their independent moral theories and not import them into the law.

I think the Supreme Court has been absolutely clear in this particular area, the welfare rights area, that there is that danger that judges, unelected and unaccountable, based on their own conceptions of justice might try to write that into the law. And I fully respect those precedents in that article——

Senator SESSIONS. Well, you know, you mentioned a while ago, pretty easily, I thought, on the question of privacy. You said that, well, privacy is what society says it is, basically, and how do you find that? Well, you look to what sources you can.

But when you get away from respecting the limitations of the Constitution and its language, then you get into finding theories out here. Do you do polling data to determine what rights are? Or do we look to foreign law, as Justice Stevens said? You said you look to foreign law to get what advice they get, but it is our Constitution that you are interpreting, the one we adopted, not some foreign law.

So doesn’t that indicate to me and to all of us that your view is that a judge indeed is free to reinterpret the meaning of the words of the Constitution and to advance what they consider to be in effect some societal value, which is unascertainable, really, by a judge in any fair and complete way?

Mr. LIU. Well, Senator, on the Fourth Amendment example, I was not actually giving my personal view about the subject. I was trying to express what the Supreme Court itself has said about the subject, and if I were an intermediate appellate judge, I would have to faithfully follow the standard of a reasonable expectation of privacy or a legitimate expectation of privacy as society recognizes it, which is the applicable standard in the Black Letter Law.

Senator SESSIONS. Well, I thank you, and I appreciate the opportunity to have this exchange. You are an able lawyer with a nimble mind and ability to articulate your position well. I would just say that I believe the values you express in your writings indicate that you have a very activist view of the role of a judge. I think it would influence your decisionmaking. I am not unaware that the Ninth Circuit is considered to be the most liberal circuit in the country. One year, they reversed 27 out of 28 cases, and the New York Times wrote that the Ninth Circuit was considered by a majority of the court as a rogue circuit.

So I am concerned about that, but I have no doubt of your good will, your skill, your leadership ability, your academic ability, and you have a wonderful family. Thank you.

Mr. LIU. Thank you, Senator.

Senator FEINSTEIN. Senator Grassley has returned, and I know he has additional questions.

Senator Blumenthal, do you have additional questions for this witness?

Senator BLUMENTHAL. I do not, Madam Chairman. I would yield to Senator Grassley.

Senator FEINSTEIN. Fine. And then I know we are keeping the other nominees quite a time, but we will try to be quick in your hearings. I think you have probably seen that this is a very interesting hearing for this particular candidate.

Senator SESSIONS. Madam Chairman, I would offer for the record a post of Ed Whelan, a lawyer, responding to Mr. Painter's letter, Professor Painter's letter, that criticized some of his writings, and he responds, I think, effectively, to those criticisms.

Senator FEINSTEIN. That was quick. It will go into the record.

[The information appears as a submission for the record.]

Senator FEINSTEIN. Senator, would you like to take the floor?

Senator GRASSLEY. If we were to, let us just say, wipe the slate clean as to your academic writings and career, what is left to justify your confirmation?

Mr. LIU. Senator, I would hope that you would not wipe my slate clean, as it were. You know, I am what I am. My resume is a scholarly resume, and all I can say about that is that I appreciate the distinction between the roles.

I think there are important facets of being a scholar that are very beneficial to being a judge: The ability to have a broad knowledge of the law, the ability to see arguments and counter-arguments, and to be fair to those arguments, and also the ability, frankly, to listen well to the litigants' positions and to subject all the arguments to the most rigorous scrutiny. I think all of those are transferable skills from one to the other.

What is not transferable absolutely are the substantive views that one might take as a matter of legal theory. Those are left at the door. And then when one becomes a judge, one applies the law as it is to the facts of every case.

Senator GRASSLEY. You devote an entire chapter in your book to defending the Supreme Court holdings in cases like Roe and Griswold and Lawrence. You describe these cases collectively as "broad constellations of cases extending constitutional protection to individual decisionmaking on intimate questions of family life, sexuality,

and reproduction.”

You argue, and I quote further, “The rights affirmed in the cases from *Griswold* . . . to *Lawrence* enjoy widespread support and acceptance. They cannot be reconciled with an arid textualism or an originalism that asks how the Framing generation would have resolved the precise issues. But they are wholly consistent with an approach to constitutional interpretation that reads original commitments and contemporary social contexts together. The evolution of constitutional protection for individual autonomy in certain areas of intimate decisionmaking reflects precisely the rich form of constitutional interpretation this book envisions.”

So the question: Given that you argue these cases “reflect precisely the rich form of constitutional interpretation this book envisions,” is it fair to say that these cases demonstrate fidelity to the Constitution under your judicial philosophy?

Mr. LIU. Well, Senator, those are cases that have been rendered by the United States Supreme Court. They are precedents of the Court, and if I were confirmed as a judge, I would fully follow them.

I do not think that there is in the writing any—it is a scholarly—what you read is a scholarly description, one scholarly description of a set of cases, and I am sure there are scholars who would disagree. But what all scholars would not disagree on, I think, is that however we might like to characterize those opinions as a matter of theory—which is what that is—the decisions speak for themselves in their own language, and any judge would have to consult not my book or any other person’s book, but those decisions themselves in applying the law to the facts of any particular case.

Senator GRASSLEY. At your prior hearing, you responded to a question from Senator Cornyn by citing *Lawrence* as a case in which the Supreme Court relied on foreign law simply because it was favorable to the majority opinion’s position. In doing so, did the Court “read original commitment and contemporary social contexts together” ?

Mr. LIU. Senator, I am not sure, and I am not sure I understand the question.

Senator GRASSLEY. Well, I can state it again, but it is pretty simple to me. We are trying to compare what you said about original commitments and contemporary social contexts, the extent to which the *Lawrence* decision and your reliance upon foreign law was favorable to the majority opinions, how that fits in with your quote that I have.

Mr. LIU. Well, Senator, in *Lawrence*, the Supreme Court was interpreting the term “liberty” in the Due Process Clause of the Fourteenth Amendment, and in interpreting that term, the Court did look to a variety of sources, but most especially it looked to the precedents of the Court itself. The primary discussion, as I remember it, in the opinion is a discussion of how the notion of liberty had traveled through a variety of the Court’s own precedents from the time of the early, I believe, 1900’s all the way up through the present day.

With respect to the citation of foreign law, I think I had said in our previous hearing that they are all reasons to be skeptical as well about the use of foreign law because one has to know whether

or not one is cherry-picking in a sense among the possible sources. And perhaps that was the caution that I expressed in the first time that we had this conversation about that case.

Senator GRASSLEY. This will be my last question. We have had a host of liberal academics admitting that the role was largely invented out of whole cloth. Professor Laurence Tribe has written, “One of the most curious things about Roe is that behind its verbal smoke screen, the substantive judgment on which it rests is nowhere to be found.”

In 1985, Justice Ginsburg described Roe as “heavy-handed judicial intervention that was difficult to justify and appears to have provoked, not resolved, conflict.”

Yale Law Professor Kermit Roosevelt, who wrote a book entitled “The Myth of Judicial Activism,” said, “As constitutional argument, Roe is barely coherent. The Court pulled its fundamental right to choose more or less from the constitutional ether.”

Edward Lazarus, a former law clerk to Justice Blackmun, wrote, “As a matter of constitutional interpretation, even the most liberal jurists, if you administer truth serum, will tell you it is basically indefensible.”

And, you know, we could go on and on, but my question to you is this: Do you still believe that Roe and its progeny demonstrate what you term “constitutional fidelity” ?

Mr. LIU. Senator, Roe is a precedent of the Court. It has been reaffirmed as recently, I believe, as 1992 in the Casey opinion by the Court. As a precedent of the Court, it is entitled to the respect that the precedents of the Supreme Court are entitled to. And in the case of an intermediate appellate judge, if I were fortunate enough to be confirmed, that means that Roe is a controlling case under the case law. So I would have to apply it faithfully if I were confirmed.

Senator GRASSLEY. And so you are saying that it demonstrates what you have terms “constitutional fidelity” ?

Mr. LIU. Senator, the Supreme Court has said that it is an appropriate decision under the United States Constitution. As an intermediate appellate judge, I am obligated to respect that.

Senator GRASSLEY. Thank you, Professor Liu.

Senator FEINSTEIN. I know this is tough, and I want to thank you. I want to thank you for your bright mind. I want to thank you for your scholastic intuition and judgment and knowledge.

I thought the answer to Senator Grassley’s last question showed that you also have courage of your views, and I thank you for that. I actually think you will be a fine—if you get there, a fine appellate court judge. And I think this is really hard because you see the polarization that exists. Whether we can overcome it or not, I do not know. I hope members will meet with you separately. I was delighted to hear that Senator Coburn agreed to do so. That means a great deal to me.

One of my concerns—and I just want to spell it out—has been that our Federal judiciary is made up of the best we can get, the intellectual and legal giants of our time, and that we not dumb it down. If you are able to make it, one thing I am sure of: You will not dumb it down.

So thank you very much for being here, and you are now excused.

Mr. LIU. Thank you, Senator Feinstein.

RAYMOND LOHIER
THURSDAY, APRIL 22, 2010

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Committee met, pursuant to notice, at 3 p.m., Room SD-226,
Dirksen Senate Office Building, Hon. Edward E. Kaufman presiding.
OPENING STATEMENT OF HON. EDWARD KAUFMAN, A U.S.
SENATOR FROM THE STATE OF DELAWARE

Senator KAUFMAN. I am pleased, and I am pleased to call this
nomination's hearing of the Senate Committee on Judiciary to
order, and I want to thank Chairman Leahy for permitting me to
Chair this hearing.

I'd like to welcome both the nominees and their families and
friends, the U.S. Senate and congratulate them, genuinely congratulate
them on the nominations and to thank their family and
friends for letting them accept the nominations.

Today we welcome Raymond Lohier, Jr., nominated to be the
Judge on the Circuit Court, Second Circuit. Mr. Lohier has 13
years of experience as a Federal prosecutor and most recently
served as a Deputy Chief and Chief of the Securities and Commodities
Fraud Task Force in the U.S. Attorney's Office for the Southern
District of New York, a very quiet place to be.

As you may know, I have been a strong champion here in the
Senate of the Department of Justice efforts to root out the fraud
that contributed to our financial crisis and bring those responsible
to justice. Poor Mr. Lohier had to listen to me yesterday talk about
that. I really appreciate your efforts. I really appreciate everything
you've done and I really appreciate your accepting this public service.
I know public service runs deeply to you and it is a wonderful
thing you are doing.

PRESENTATION OF RAYMOND J. LOHIER JR., NOMINEE TO BE
U.S. CIRCUIT JUDGE FOR THE SECOND CIRCUIT BY EDWARD
E. KAUFMAN, A U.S. SENATOR FROM THE STATE OF DELAWARE
FOR SENATOR SCHUMER

Senator KAUFMAN. Next I have the pleasure of introducing Mr.
Lohier. Senator Schumer told me that unfortunately he couldn't be
here, which is the Senate is crazy now, but he sends his regret.
He has a statement here he wants to put in the record. Chairman
Leahy has a statement he wants to put in the record on both
the nominees. If there is no objection, I will put them in the record.
Hearing none.

[The prepared statement of Senator Schumer and Chairman
Leahy appears as a submission for the record.]

Mr. Lohier has had a distinguished career as a Federal prosecutor.
He served as a trial attorney in U.S. Department of Justice
Civil Rights Division and since 2000 has been an Assistant U.S. Attorney
in the Office of the U.S. Attorney for the Southern District
of New York where he is currently Special Counsel for the U.S. Attorney.
In the Southern District of New York, he has held multiple leadership
positions. As Deputy Chief and Chief of the Narcotics Unit,
Mr. Lohier supervised the investigation and prosecution of hundreds
of cases involving large scale drug distribution networks.

He has also served as Deputy Chief and Chief of the Southern District of New York Securities and Commodities Fraud Task Force. In these roles, he supervised or co-supervised all of the District's securities fraud trials.

Most notably, Mr. Lohier oversaw the investigation and prosecution of Bernie Madoff, one of the biggest fraud cases in the country's history. His work led to Madoff's conviction, a sentence of 150 years in prison and a forfeiture of more than \$70 billion.

Mr. Lohier also participated in the investigation and prosecution of New York Attorney Marc Dreier for a \$750 million Ponzi scheme resulting in a 20-year prison sentence and forfeiture of more than \$740 million.

Mr. Lohier has received several honors and awards for his outstanding work including the Attorney General's John Marshall Award for Outstanding Legal Achievement and multiple Department of Justice Special Achievement awards.

Mr. Lohier, your credentials are truly impressive and we are deeply grateful for your public service.

With the agreement of the Ranking Member and in the interest of efficiency, we are going to have both nominees on the same panel. So if you'd come forward.

I'd like you both to please stand and raise your right hands and repeat after me.

Do you affirm the testimony you are about to give before the Committee will be the truth, the whole truth and nothing but the truth so help you God?

Mr. LOHIER. I do.

Senator KAUFMAN. Thank you. Let the record show the nominees have taken the oath.

Mr. Lohier, I welcome you and acknowledge any family members or friends you have here today and then give an opening statement.

STATEMENT OF RAYMOND LOHIER, TO BE U.S. CIRCUIT JUDGE FOR THE SECOND CIRCUIT

Mr. LOHIER. Thank you, Senator. I don't have a specific opening statement, but I would like to thank the Committee and you, Senator, for presiding over this hearing promptly. I would also like to thank Senator Schumer for his unstinting support throughout this process as well as Senator Gillibrand.

I'd like to thank the many members of the Department of Justice, both my current colleagues and former colleagues who have expressed their support and good wishes. Of course I'd like to thank the President for nominating me. It is a great privilege and a great honor.

I would be more than happy to answer the Committee's questions, but before that if I may, I would like to introduce and take advantage of your kind offer to introduce members of my family.

Senator KAUFMAN. Great.

Mr. LOHIER. I have here with me my lovely wife, Donna, who I was fortunate enough to meet in my first year of law school and everything went well since then.

I have also with me my two boys. William, who is eight, and John, who is six. Senator, I don't want you to be alarmed if you see them make a run for the door at any given time.

Senator KAUFMAN. I will not be alarmed.

Mr. LOHIER. I also have with me my mother, Flocie Lohier, who as much as anyone else, taught me the value of hard work and integrity. I thank her for being here.

My father, who passed away approximately two and a half years ago I'm sure is looking over me right now and is here in spirit. I'd also like to acknowledge the fact that both my father-in-law and my mother-in-law, C.S. Lee and Nancy Lee, drove all the way up here from Florida to be here, and I thank them very much for that.

I have a very close family friend, Pat Taboe, who is also here who came last night and I appreciate her presence. I'd especially like to acknowledge the presence of someone who has been my mentor and whom I had the privilege of serving as a law clerk, and that's Judge Robert P. Patterson, Jr., of the United States District Court for the Southern District of New York and I truly have valued his mentorship over the course of the years that I have known him and since I have clerked for him.

In addition, Senator, I have got several of my wife's uncles and an aunt, Mee-Sang Skrajnowski and Wlodek Skrajnowski and K.S. Lee as well as many, many friends from law school and college and high school. I thank them all for being here. I thank you again.

Senator KAUFMAN. And I thank them for letting you do this, taking on this responsibility. I know it's a hardship on family and friends, but I think it's so incredibly worthwhile and I appreciate what you're doing.

Senator KAUFMAN. And again, thank your family for allowing you to embark on this adventure. I tell you, you are honored by having Judge Sleet and Professor Soles here with you two folks who are among the most respected in Delaware. So it's an honor for you to have them here and it's an honor for us that they are here.

What I'd like to do is just ask some questions. Senator Sessions is on his way, he should be here in a few minutes, but I'm just going to start and proceed. What I'd like to do is just ask a series of questions to both of you. We'll start with Mr. Lohier.

Could you briefly describe your judicial philosophy?

Mr. LOHIER. Yes, Senator. If I am fortunate enough to be confirmed as a Circuit Court Judge, my judicial philosophy would be very straightforward. That is that I would apply the law either Supreme Court precedent, binding Supreme Court precedent or binding Second Circuit Court precedent or the plain text of a statute.

I would apply that law to the facts in the record of the case and I would do so objectively, impartially and with an open mind.

Senator KAUFMAN. Mr. Lohier, you have spent 13 years as a Federal prosecutor. Can you kind of lay out what it is you learned in that that would be helpful to be on the bench?

Mr. LOHIER. I've learned a tremendous amount, Senator. First and foremost, as a prosecutor in the Southern District of New York, I had the great privilege of writing briefs and submitting briefs, as well as arguing orally before the Second Circuit Court of Appeals which is always a formidable experience.

In addition, I learned what it takes to create a record below the District level, what goes into a record and what the potential pitfalls and appealable issues below may be.

In addition to that, as a supervisor I was blessed. I was blessed to supervise some of the most outstanding, in my view, prosecutors in the country on very difficult cases, some of which you mentioned. In the course of my supervision of those fine, fine, prosecutors, I had the opportunity to review decisions, to grapple with incredibly complex legal scenarios and legal issues, as well as a very wide array of facts, very complex facts both on the financial fraud front as well as the narcotics front.

As a result of that, I have had a wide range of experience that I think will serve me well.

Senator KAUFMAN. Both of you have been prosecutors. Can you just spend a few minutes and talk about what you've learned as prosecutors and what you think of the effect of deterrents for white collar crime?

Mr. Lohier.

Mr. LOHIER. With respect to white collar crime, Senator, and I know that you have worked incredibly hard in this area. I believe that the fight against financial fraud and the fight against financial crimes is a critical fight that our Nation faces.

Certainly as a judge, I will abide by the Supreme Court precedent and abide by and comply with any Second Circuit Court precedent in the area of financial crimes, but it means a lot to me and I have learned how critical that fight is to the integrity of our markets.

Senator KAUFMAN. And how much of it do you think is stiffer sentences or surety of longer prison sentences? I mean, is there any one thing that you think really is more helpful than another as a deterrent?

Mr. LOHIER. I think stiffer sentences do have a deterrent effect, Senator. I also think that the regulation in place that is in place to make sure that the defendants know what the line is are critical, and those bright line rules that we have in place are also critical to combat financial crime.

Senator KAUFMAN. Great. I want to thank you both for this hearing. Judge Sessions is held up in his meeting, so what I would like to do is thank you both for being here today, congratulate you on your nominations. I think it is easy to see that you are both truly qualified and we are grateful, as I said before, grateful to you but even more grateful to your spouses and friends and family that you answered the Federal services call and are willing to serve in the positions that you have.

I wish you the very best of luck. I have no doubt you're going to have wonderful careers and I'm looking forward to seeing you confirmed out of the Senate and onto your posts. So with that, I'll adjourn.

GERARD LYNCH
TUESDAY, MAY 12, 2009
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:36 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Charles E. Schumer, presiding.

Present: Senators Schumer, Klobuchar, and Sessions.

OPENING STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. The hearing will come to order, and I want to welcome Judge Lynch and Ms. Smith and your families as well who I see here. You look like families, anyway, which just means you are very nice looking and proud.

Anyway, first Judge Lynch. Judge Lynch, I could not be more pleased to have a second opportunity to honor your hard work and service to the law, all the more so because your story begins in your hometown of Brooklyn, which is my hometown, too.

Judge Lynch, who currently sits as a U.S. District Judge in the Southern District of New York, comes to us for confirmation to the Second Circuit, much as he did in 2000 for his first confirmation, with an unimpeachable record of moderation, consistency, intelligence, and dedication to exploring all facets of complex legal questions.

In his 9 years on the bench, he has issued nearly 800 opinions, tried nearly 90 cases to verdict, and has been overturned by the Second Circuit only 12 times. And one of those times, I might add, the Second Circuit was in turn reversed by the United States Supreme Court.

There should not be any doubt that Judge Lynch is not an ideologue. His opinions and writings show moderation and thoughtfulness. He is pragmatic. His peers and those who practice before him have found him to be both probing and courteous—in sum, very judicial in his temperament.

In response to questions before the Senate Judiciary Committee in 2000, Judge Lynch said, “A judge who comes to the bench with?—and I would like my colleague to particularly hear these lines—that is not you, Amy.

[Laughter.]

Senator KLOBUCHAR. Thank you very much for clarifying that for the record.

Senator SCHUMER. “A judge who comes to the bench with an agenda or a set of social problems he or she would like to solve is in the wrong business.”

Senator SESSIONS. Amen.

Senator SCHUMER. Let the record show Senator Sessions noted his assent to that sentiment.

I could not agree more, and I expect and hope that my colleagues on the Committee feel the same way.

As I have said many times, my criteria for selecting good judges are three: Excellence, legal excellence, no political hacks; moderation—I do not like judges too far right, as Jeff knows, but I also do not like judges too far left; and diversity—I try to put as many

women and people of color on the bench as I can.

There is no question that Judge Lynch meets the standard of excellence.

He was first in his class—he was first in both classes at Columbia, college and law school. I hope he had a good time while he was there. His opinions are scholarly—I mean, I figure if you are first in your class for one, you deserve to have a good time at the other. But he was first in his class both—and one that was overturned by the Second Circuit was lauded by the panel as “a valiant effort by a conscientious district judge.”

There is no question Judge Lynch is, in fact, a moderate. His impressively low reversal rate should give the lie to any argument he is outside the legal mainstream. I might note here, too, that three of those 12 reversals came in cases in which he had ruled for the government and against plaintiffs who had alleged various forms of government misconduct.

Now, the rap on Judge Lynch in 2000 among the 36 who voted against him was that he would be an “activist.” The view arose from an out-of-context outtake from two law review articles. I will repeat now what I said then. In both of these articles, then-Professor Lynch expressed the moderate view that the Constitution cannot, as a practical matter, remain frozen in the 18th century.

The Constitution should not be expanded, but it must be interpreted.

To illustrate my point about why Judge Lynch should be accepted as a paragon of moderation, I want to read two quotes.

First, “Text is the definitive expression of what was legislated.”

Second, “A text should not be construed strictly and should not be construed leniently. It should be construed reasonably to contain all that it fairly means.”

The second quote was written by Associate Justice Antonin Scalia. The first quote, sounding almost the same, was from Judge Lynch.

At the end of the day, we could revisit old arguments about Judge Lynch’s previous writings, but we do not have to. There is no reason to take snippets of what he has written in the course of a long and august career and try to read them like a sidewalk psychic reads palms. Instead, let us look at his copious opinions and rulings. He has been the definition of law-enforcing and justice-seeking.

He has ruled for the State against prisoners, but he has also ruled the State must protect due process rights of those it seeks to detain. He has sentenced defendants convicted of horrible crimes to life without parole. And he has also expressed concerns when he thinks a sentence might be too long while imposing the sentence in complete accordance with the law. He has issued complex and scholarly opinions in securities and antitrust cases.

We have covered excellence and moderation. Let me say a word now about diversity. Judge Lynch obviously is not a nominee who fits this bill. There is no way to get around that. But I want to note another kind of diversity that I believe deserves mention. Before he went on the bench, Judge Lynch sought out opportunities to be more than a smart professor living in an ivory tower. He spent a total of 5 years in the U.S. Attorney’s Office in the Southern District of New York, as chief of the Appellate Section and chief of the Criminal Division. He worked as counsel to a prominent law firm, and he took on numerous pro bono cases. In short, he lived the life

of a real lawyer while teaching and writing. And driven by his own conscience, he even registered for the draft during the Vietnam War rather than seek a college deferment. That speaks lots. It does. I salute you for that, Judge.

This is someone who has sought out a diversity of experiences which he now brings to the table as a judge. I look forward to this new chapter in Judge Lynch's service to our country.

With that, I yield to our—and I want to congratulate him publicly. Is it official yet?

Senator SESSIONS. Sort of—yes.

Senator SCHUMER. It is official. It was first sort of official, but then became official. I want to congratulate Jeff Sessions on his ascension to be the Ranking Member of the Judiciary Committee. As I have said publicly to the press, Jeff and I do not agree on a whole lot of issues, but he is a straight shooter. He tells you what he thinks, and you can sit down and come to agreements and compromises with him even when you are far apart on the issues. So I think he will be a proud addition as Ranking Minority to the Judiciary Committee.

And now I call on Senator Sessions for a statement.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you. Mr. Chairman, it is great to be with you, and I would like to welcome both our nominees today.

Judge Lynch, I really enjoyed our conversation yesterday. You are a man of judgment and integrity and good brain power and insight, and I appreciated that opportunity.

I know Senator Schumer was a big defender of yours last time. He had a lot of confidence in your ability. I made a speech that I thought was pretty persuasive, and he followed me and almost convinced me after you did a good job with that debate. So I did vote against you at that time based on——

Senator SCHUMER. Not good enough, evidently.

[Laughter.]

Senator SESSIONS. And a number of other Senators did. But it is a lifetime appointment that you are seeking to the Federal appellate court, and I think the Senate's obligation is very real, and that is to examine the nominee carefully, and it should not be taken lightly.

The people of the country have only one opportunity to decide whether an individual is worthy of this high office, and that is this one, and so we have to fulfill our duty. And we will ask you to answer certain questions such as: As a nominee, do you understand that your role as a judge is to follow the law, regardless of personal feelings and preferences? Does he or she understand the role of precedent? Can the nominee put aside political views which may be appropriate as a legislator, executive, or even professor, but interpret that law as written? And will the nominee keep his or her oath to uphold the Constitution first and foremost?

As to legal skill and personal integrity and ability to decide cases, I think your record is good, and I certainly respect that.

In 2000, when you were first nominated to the district judgeship, I expressed concern that you might harbor activist tendencies and legislate from the bench. As a result, I think 35 members joined

me in opposing that confirmation. I still have some concerns on your record while on the bench, especially when considered in conjunction with some of your written remarks in the past criticizing the textualist approach to constitutional interpretation.

Some of your rulings and statements have reminded me of my concerns 9 years ago about willingness to be bound by the law and the Constitution. One of my concerns relates to Judge Lynch's handling of the Pabon-Curz case, where a defendant accused of distributing hundreds of images of graphic child pornography faced a possible 10-year minimum sentence. Judge Lynch did not approve of this sentence, and he said so, but it was prescribed by the law. He said, "Pabon is a young and sympathetic defendant who faces a draconian penalty for his offenses."

He then sought to inform the jury that the defendant faced a mandatory 10-year sentence which would have enabled the jury to nullify Congress' policy judgment on the appropriate prison term for this kind of sentence and would be contrary to the Federal law that the juries are not told about what the sentences will be. So I am concerned that those feelings may have led you to go beyond the normal legal requirements that a judge has.

I do not want to and I am not going to evaluate Judge Lynch, however, on this one case. To his credit, he gave the prosecution an opportunity openly to appeal the decision to the Second Circuit, which did reverse his decision. But I am concerned about this case because it does appear that feelings may have trumped the text of the law and the will of Congress. Given the small number of cases that the Supreme Court accepts for review each term, our appellate courts are often the court of last resort for litigants.

So I come to this with an open mind and would cite, in addition to Senator Schumer's compliments, a very nice letter I received today from Mary Jo White, former United States Attorney in Manhattan, and she is strongly of the view that you are an excellent nominee and would be an excellent judge, and I am impressed that you had experience as a prosecutor as well as a defense lawyer. So I look forward to looking at that and see where we go from here. Some of the judges, probably less than 5 percent or so, that I opposed that President Clinton nominated, some of those I opposed, I was proven right, in my view—some of which I am not so sure, and, Judge, I think you are in that category.

Senator SCHUMER. Thank you. Senator Klobuchar has graciously agreed to make her opening statement when she asks questions, and so we will give her a little more time.

Now I would like to call on my colleague from New York, Senator Kirsten Gillibrand, who is doing a great job here in the Senate.

Senator Gillibrand.

PRESENTATION OF GERARD E. LYNCH, NOMINEE TO BE CIRCUIT JUDGE FOR THE SECOND CIRCUIT, BY HON. KIRSTEN E. GILLIBRAND, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator GILLIBRAND. Thank you, Senator Schumer, and thank you, Ranking Member Sessions. I appreciate you holding this hearing and the opportunity to introduce Judge Gerard Lynch today. I am pleased to be able to speak in support of one of New York's finest jurists.

President Obama has chosen one of the country's outstanding legal minds with his nomination of Gerard Lynch to the United States Court of Appeals for the Second Circuit. I had the great privilege of being a clerk on the Second Circuit for the Honorable Roger J. Miner, who is now serving senior status, so I hope that if, indeed, Judge Lynch is confirmed that he will get to serve with him.

Gerard Lynch is an accomplished and distinguished jurist whose experience and erudition make him an excellent nominee for the United States Court of Appeals for the Second Circuit. His distinguished biography is a study in excellence: A commitment to learning, a commitment to the law, and the actualization of some of the highest ideals of our country.

Judge Lynch grew up in a working-class neighborhood of Brooklyn. The son of an airline mechanic and a homemaker, Judge Lynch was the first in his family to attend college. After graduating first in his class from Regis High School, he received his B.A. from Columbia in 1972, where he was valedictorian. He received his J.D. from Columbia in 1975 and again graduated first in his class.

Following law school, he clerked for Judge Wilfred Feinberg of the U.S. Court of Appeals for the Second Circuit from 1975 to 1976, and for Justice William Brennan on the U.S. Supreme Court from 1976 to 1977. Justice Brennan, as you know, the second longest serving Justice on the Supreme Court, is also considered one of the great men and jurists of our time. His decisions have largely stood the test of time and continue to have a direct effect on our daily lives. His decisions stood for the rights of the individual against the immense power of the state.

Judge Lynch in his own life dedicated much of his life to the same goal in a variety of positions in which he served, including Assistant U.S. Attorney to the Southern District of New York, Special Counsel for the New York Special Commission to investigate city contracts, chief counsel for the New York Commission on Government Integrity, associate counsel for the Iran-contra Independent Counsel, chief of the Criminal Division for the Southern District of New York U.S. Attorney's office, and special counsel for the Office of Independent Counsel. In all of these positions, his responsibilities were grounded in the concepts of integrity, transparency, and accountability, and in an enduring dedication to the rule of law.

The importance of educating young students in the law is also of great importance to Judge Lynch. As a legal scholar and an educator, he spent 9 years on the faculty of Columbia Law School, becoming full professor after only 9 years, and was awarded an endowed chair in 1996. An expert in both criminal law and procedure, Judge Lynch is the author of significant legal articles on the subject of purpose, structure, function, advantages, and disadvantages of the RICO statute.

Judge Lynch has served on the United States District Court for the Southern District of New York for the last 9 years and has earned the reputation for fairness and toughness. The strength of his logic and grounding in law is witnessed by the fact that he has tried over 90 cases to a verdict and rarely has been reversed by the

Second Circuit.

Judge Lynch is held in extremely high regard by his peers and is widely viewed as one of New York's finest jurists. Leading members of the New York legal community testified to his brilliance, his fairness, his commitment, and his preparation. I enthusiastically support Judge Lynch's nomination because of his character, integrity, and intellect. We are so fortunate that we have a jurist such

as Judge Lynch serving the public good in our legal system.

Thank you, Mr. Chairman.

Senator SCHUMER. Well, thank you, Senator Gillibrand, for an excellent statement, typically, and thank you for being here.

Senator GILLIBRAND. You are welcome.

Senator SCHUMER. Now let me call both our nominees to the witness stand here. I guess we will call it that. And please remain standing as I administer the oath of office.

Will you both stand and be sworn? Okay. Do you affirm that the testimony you are about to give before the Committee will be—please raise your right hand. They did not put that here, but let us do it. Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge LYNCH. I do.

Senator SCHUMER. Thank you. You may be seated.

First, I am going to call on Judge Lynch. Please introduce your family, tell us who they are. It is always nice to see families here. Then if you have some brief remarks, you may make them. Then we will call on Mary Smith doing the same. And then we will go to question.

So, Judge Lynch, you are on.

STATEMENT OF GERARD E. LYNCH, NOMINEE TO BE CIRCUIT JUDGE FOR THE SECOND CIRCUIT

Judge LYNCH. Thank you, Mr. Chairman. I want to introduce my family who are here with me today: My wife of 37 years, Dr. Karen Marisak, who is a clinical psychologist; and with me also is the apple of my eye, my son, Christopher, who is graduating from law school in 2 weeks; and with me and with him is his fiancée, Ms. Katie Wilson, who starts a Ph.D. program in economics next year. So I am very grateful to them for being here.

I have no real opening statement other than to thank the President for the great honor that he has done to me in nominating me for this position; to thank you, Senator Schumer, and Senator Gillibrand for the very kind remarks that you made; to thank the other Senators for being here, and particularly to thank Senator Sessions for his courtesy to me in meeting with me yesterday, as he referred to.

But other than that, I stand prepared to answer any questions that anyone has.

Senator SCHUMER. Thank you, Judge Lynch.

Senator SCHUMER. Okay, good. So let me ask some questions here. First question for Gerry Lynch, since he is from Brooklyn. I forgot. What high school did you go to? This is what Brooklynites ask one another.

Judge LYNCH. I went to Regis High School in Manhattan.

Senator SCHUMER. Regis. Yes, I remember that. Regis is probably the finest Catholic school in New—well, I do not want to get myself

in trouble—one of the finest Catholic schools in New York State, really excellent as a school. And where did you live in Brooklyn?

Judge LYNCH. I lived on the Brooklyn-Queens border in Ridgewood.

Senator SCHUMER. Ridgewood. Nice. What street?

Judge LYNCH. 67th Avenue, right near the Fresh Pond Road subway.

Senator SCHUMER. That is really the Queens——

Judge LYNCH. That is in the Queens end, yes. Before that, though, I was born on the Brooklyn side in what was then Bethany Deaconess Hospital, and I lived on Underdunk Avenue.

Senator SCHUMER. Underdunk Avenue. 67th Road is right near St. Pancras. That is really Glendale, wouldn't you call it?

Judge LYNCH. Well, 67th Avenue is different from 67th Road.

Senator SCHUMER. Oh, 67th Avenue, Okay.

Judge LYNCH. You know Queens as well as Brooklyn, Senator.

Senator SCHUMER. That was my old congressional district, and just this Sunday—I ride my bike all over the city, and so I love to go ride and see churches. So I went to St. Matthias.

Judge LYNCH. That is my parish.

Senator SCHUMER. Right, and I saw the pastor. He was greeting the parishioners as they came out. And here is what you would be happy to know. They had five masses that day—one in English, one in German, one in Polish, one in Italian, and one in Spanish, which shows you the diversity of the great Ridgewood neighborhood, and it is beautiful. What a beautiful church. I do not know the history, how they got—it is a European style church right there in Ridgewood. It is gorgeous.

I have no more—no.

[Laughter.]

First, Judge Lynch, tell me who your model is of an appellate judge. Give me somebody you——

Judge LYNCH. The judge that I clerked for when I graduated from law school was Judge Wilfred Feinberg, and I think he is the model of an appellate judge. He recently received the so-called Devitt Award, which is a kind of lifetime achievement award for Federal judges. He is now 89 and still sits as a senior judge, still with the same intelligence and meticulousness.

But what I learned from him was the judicial craft. He was a very—and is a very cautious—I will use the past tense often because of when I worked for him.

Senator SCHUMER. Right.

Judge LYNCH. But it is still true today. He is a very careful judge who always—when I drafted opinions for him, he always wanted to make sure that any word that was said, any sentence that we said, had to be backed up by precedent. I would sometimes say, “But, Judge, isn't that obvious?” He would say, “Well, but do we really have to say it then if there is not a precedent to back it up? ” And so I learned that kind of craft from him.

Senator SCHUMER. Great. Yes, and he was one of the outstanding judges. I think my friend Kevin Bain clerked for him several years before you did. Okay.

Do you believe in judicial restraint? And explain your answer, including your own definition of what “judicial restraint” means.

Judge LYNCH. Well, I think the principal thing that—there are two pieces that I would say are the principal things about judicial

restraint. One is in the ordinary kind of case that does not have any constitutional dimensions or anything of the sort, judges are to decide only the issues that are before them, so that quite apart from respect for the legislature, just in any ordinary case it is very important that courts sit to decide the dispute that is before them, not to go beyond that and talk about other broader issues that are not necessary to the decision of that case. So that is one important aspect of judicial restraint.

The other is that where constitutional questions are part of the case, courts should presume that what legislatures do is constitutional.

I will speak only on the Federal level to start with. The Congress is not only a co-equal branch, but it is the branch that speaks for the people. When there is a law that is adopted by Congress, signed by the President, it is to be expected that both the Congress and the President have considered constitutional matters and decided that the law is constitutional.

Now, the court has to make its own decision about a constitutional issue. That is our responsibility. That is our oath. But there still should be an assumption that what has been done is constitutional, and it should only be overturned if the law is clearly unconstitutional according to the text of the Constitution and the precedents that have been established.

Senator SCHUMER. Thank you. Okay. Thank you. My time has expired. Let me call on my colleague, Senator Sessions.

Senator SESSIONS. Thank you.

Judge Lynch, with regard to your actions concerning the individual that was charged with pornography on their computer, had quite a number of pretty gruesome and explicit pornography images on the computer, you felt that the sentence was too heavy, the mandatory minimum that Congress had set. Would you just tell us what you did and how the appeal took place and how you would justify that since it did appear to be that, as a judge, you were taking a position explicitly contrary to the law?

Judge LYNCH. No, I do not think so, Senator, but I am happy to explain my actions.

First, in that case, it seems to me that I was entirely respectful of the government. I proposed to do something that is unusual, but that in a very recent case, the Second Circuit has now said is something that a district judge may do in an appropriate case, which is to advise the jury of what the sentencing consequences of their decision would be. So I put it to the government in a proposed charge where I told them not only that I was proposing to do that, but also that I would instruct the jury, as I instruct every jury, that if they found guilt beyond a reasonable doubt, they must on their oath return a guilty verdict.

There was nothing in the charge that encouraged any kind of nullification. I did not allow any lawyer to argue and did not propose to allow any lawyer to engage in an argument for nullification.

I told the government that I was going to do that, not as any kind of threat but in order to give them the opportunity that, if they wished, they could seek review of that decision. They did. The Second Circuit told me I should not do that, and I did not do that.

I would go on to say that when the defendant was convicted of these offenses, I did impose what I believed and what the prosecutor

and the defense lawyer and the probation department believed was the mandatory sentence that Congress had ordained. It turned out I was wrong. One embarrassing part of the case to, I think, the whole legal system is that the statute did not, in fact, impose a mandatory sentence in the view of the Second Circuit because of a glitch in the wording of the statute, and they sent it back to me with instructions to impose a sentence under the ordinary guidelines and rules of sentencing and not according to what we had all thought was the mandatory sentence. So I followed the directions of the higher court at every turn.

If I may say one other thing, Senator, I should also say I would certainly understand a hesitation on the part of any member of this body to confirm a judge that they thought did not appreciate the seriousness of child pornography. As a prosecutor and as a judge, I have been forced to look at some of this material. It is not only repulsive, it—that is not even the issue. It is not about obscenity. It is about the fact that these images are the record of atrocities committed against children. And I have no doubt about the seriousness of that offense.

I have only had one other such case. In that case, I gave a gentleman a sentence that will keep him in prison until he is nearly 70 years old. He is now in his mid-50's. But in this particular case—I do not want to re-argue the case, but it was a different situation. Senator SESSIONS. Well, what is pretty clear is that under what everyone thought at the time, 10 years was the mandatory sentence, and you personally did not agree with it, and you personally took a step that I think—maybe the Second Circuit subsequently has changed the law. But at that time, judges were not empowered to tell what the sentence would be to the jury because that clouds their decisionmaking process. Their role in the process was to decide the guilt or innocence, and the defendant would then have to suffer whatever the penalties call for.

So weren't you, in effect, showing your personal view that you felt this was an excessive sentence, overcame the normal processes, leading to, in a delay, an expensive appeal which the prosecutor might have capitulated in and given in to your threat and allowed the case forward, but instead apparently they decided, no, we are not going to give in to that, we are going to take it up on appeal—which you gave them the right to do—and then it was reversed at some great expense and delay.

Judge LYNCH. Well, the delay was about 2 days of——
Senator SESSIONS. I think that is the way I read it as a prosecutor. I know how a judge can work you over and put you in a tough position, and it looks like to me the prosecutor said no, and he stood up. Sometimes you fold up in the face of a good, strong judge. And this time he said no and prevailed.

Judge LYNCH. Well, Senator, I think if you consulted any of the U.S. Attorneys who have served in that position while I have been a judge or any of the United States Attorneys under whom I served as a Federal prosecutor, I think that they would be unanimously of the view that I am a fair judge, that I do not threaten prosecutors or browbeat prosecutors, that I do not play games and tricks, that I do not try to force prosecutors to do things that they do not want to do or that they do not think is right to do; that I am a

straight shooter and I tell the prosecutor what I plan to do, just as I tell defense lawyers what I plan to do and give them the opportunity to argue to me that I am mistaken and, if necessary, to take appeals. And I think anyone in New York would be very surprised at the idea that I would try to browbeat a prosecutor or trick a prosecutor.

Senator SESSIONS. Well, that is what this was. I mean, you told them: You will either agree to this kind of sentence, or I am going to do something that is unprecedented. I am going to tell the jury what the minimum sentence is, which the prosecutor had a right to object to, and you forced the prosecutor to choose whether to knuckle under or appeal, and the prosecutor appealed and reversed you.

Now, that is what happened. I am not saying that is the only—that a person is not entitled to make an error, and I am not saying that 10 years might have been too severe in this case. I do not know the facts. You knew them better than I. I am not criticizing you for that. But I think on this particular question, you went beyond the normal role of a judge. Wouldn't you agree?

Judge LYNCH. Well, I certainly respect your view of that, Senator, but I would question one thing or one way that you are putting this. I never threatened the prosecutor to agree to this sentence or I will do something. I had suggested to the prosecutor, as I sometimes do—we have a very large district and a lot of young prosecutors. And I suggested to the prosecutor that he make sure that his office was supportive of the position that was being taken and that he seek review of that. He did. They decided to prosecute under this statute, and that was fine.

During the trial I suggested that this was something that I was going to do. There was never any quid pro quo or any idea that—

Senator SESSIONS. Didn't you suggest that 4 years you thought was appropriate?

Judge LYNCH. I do not think I ever said that. That is the sentence that I ultimately gave 2 years later when it came back—

Senator SESSIONS. Well, basically you said you felt the sentence was too heavy as mandated, and you wanted the prosecutor to review the recommendation and seek review by higher officials in the Department of Justice—which you have a right to do, I think. I think that is a healthy thing to do. But they did not agree.

Judge LYNCH. They did not agree. They absolutely did not—there is no question about that, Senator. And there is no question the Second Circuit thought I was wrong, told me so. They have done it on other occasions.

Senator SESSIONS. But not too many.

Judge LYNCH. Not too many. But if they do, then I have to follow what they say, and I have always tried to follow what the higher courts tell me is the law.

Senator SESSIONS. My time is up.

Senator SCHUMER. Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Chairman.

Thank you to both of our nominees and their families.

Judge Lynch, you have had a distinguished record on the bench for the last 10 years, and you were a public servant long before that as a Federal prosecutor and as counsel to a number of investigative

commissions and independent counsels.

I do note, just reading your biography here, that you served as an Assistant U.S. Attorney and chief of the Criminal Division under two Republican administrations. And I know you had a good exchange there with Senator Sessions. I am just going to ask you if you wanted to clarify. You were saying you wanted to clarify the difference between the cases, one in which you put someone away who was a child pornographer—or engaged in child pornography—until he was 70 and this case where you felt that a shorter sentence was warranted.

Judge LYNCH. Well, in both cases, the crime, the principal crime, was transmission of child pornography over the Internet. Neither of these individuals made the pornography or were in the commercial distribution of pornography. The older man, however, had a record of pedophilia, certainly had a past history of child abuse. He also engaged with the undercover officer, who was pretending to be first a mother and then a child, in seductive behavior and attempting to engage the child ultimately in sexual activities. He made no pretense of recognizing that he had a problem, either defended or denied his actions at all times, and seemed to me to be a rather dangerous individual.

Mr. Pabon-Cruz was 18 years old. He had started engaging in this collection of images before he was 18 years old. He had no record of any sexual activity of any kind, as far as anyone knew, whatsoever. He acknowledged that he had a problem and wanted to seek treatment for it.

I asked the government at the sentencing, the ultimate sentencing, when I had discretion—it did not matter when it was a mandatory sentence or I thought it was a mandatory sentence. But I asked the government if they had any information for me about young people who may be attracted to child pornography, whether there is scientific evidence that such people pose a danger, whether there is any evidence about whether early treatment makes a difference, or whether this is something that is ingrained in somebody from an early age. And they told me they did not really know; they did not have any evidence one way or the other. And there may be such evidence. I do not know. But in that situation it seemed to me that a lesser sentence was appropriate in that case.

Senator KLOBUCHAR. Well, thank you very much for that explanation.

Senator SESSIONS. Judge Lynch, I do not know that I asked you—we debated it last time when you did a memorial address for Justice Brennan, whom you clerked for, and it was always sort of a significant matter to me that he dissented on every death penalty case, which I thought was breathtaking, because he declared that the Eighth Amendment cruel and unusual punishment prohibition outlawed the death penalty when within the Constitution itself there are quite a few references to capital crimes, to not taking life without due process, and every State at the time the Constitution was adopted had a death penalty, and so did the Federal Government. So the people who adopted the Constitution had no idea that someone would take the “cruel and unusual punishment” language 200 years later and say the Constitution prohibits the death penalty. Now, we can all disagree on it, but I guess—let me ask you—and you praised him at that memorial address and said that you should

interpret the Constitution, at least Justice Brennan did, in light of what happens today and not some 18th century textbook, as I recall. So do you mean that an appellate judge is free to take the

Constitution and just give its meaning that has been established for 200 years a new meaning because it is today and not then?

Judge LYNCH. No, of course not, Senator. The Constitution is a written document. That is what gives it its power and its legitimacy.

That is why, unlike many countries, statutes that are passed here are subject to judicial review because the people established a Constitution. And it is only the Constitution that they established, the written Constitution, that gives any judge the authority to say that something is unconstitutional. That is not some free range power of the judge. That is because the Constitution, as it exists, as it is written, is the law of the land.

What changes is society, not the Constitution, and there are certainly, as we all know, problems that come up in our society that the Framers had no idea of. Recently, the Supreme Court decided a case about whether—not that recently anymore. A few years ago. A case about whether technology that could look inside somebody's house from outside constituted a search.

Now, James Madison I do not think would have had much thought about that, of course. But the principle in the Constitution talked about reasonable and unreasonable searches and seizures. And a court is going to have to look at the contemporary problems and apply to that the principles that are adopted in the Constitution. And there is nothing in a dictionary from the 18th century that is going to help with that.

Of course, we do know what the Framers thought about searches and seizures, and we should look back to that for guidance in applying it to these new problems.

Senator SESSIONS. Well, I think that is correct. But I do not think—and I am not going to ask you to criticize the man who gave you your job as a law clerk on the U.S. Supreme Court, which is quite an honor to achieve. But I will. I think that is not the principle he used. This was not a question of high-tech examples of search and seizure. It was an absolute reversal of the plain textual language of the Court by twisting one clause and causing it to override a whole bunch of other clauses. Fortunately, no members of the Court now adhere to that view, but at the time two did, and many thought the Court may continue that line of reasoning. But, fortunately, they have drawn back.

Well, those are issues that are important. I think you have to give—as Professor Van Alstyne of Duke once said, if you respect the Constitution, really respect it, you will enforce it like it is written, not like you would like it to be. And in the long run, all our liberties are better protected in that way.

Mr. Chairman, I appreciate your courtesy in allowing me to ramble on. I think these are important questions, and I intend to give both these nominees a fair evaluation.

Senator SCHUMER. Well, thank you, Senator Sessions, and I appreciate your questions and your desire to be very fair here.

If there are no more questions, we are going to hold the record open for a week so people can submit written questions. We thank both the witnesses and your families. I am sure they are all proud

of you. And we look forward to considering both of your nominations.
With that, the hearing is adjourned.

BEVERLY MARTIN
WEDNESDAY, JULY 29, 2009

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Committee met, pursuant to notice, at 10 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Klobuchar, Specter, Franken, Sessions and Hatch.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning, everyone. Yesterday, the Judiciary Committee reported the nomination of Judge Sonia Sotomayor to be a justice on the United States Supreme Court. And this morning, we are holding our first confirmation hearing for lower court nominees since the Supreme Court vacancy arose in May.

The vacancies throughout the Federal courts have already risen to over 80. In addition, 27 upcoming vacancies have been announced. That is going to push Federal judicial vacancies to over 100. We worked very hard to fill the vacancies during the last presidency. Back when I chaired this Committee and we had a President of the other party in the White House, we were able to reduce overall vacancies by two-thirds, from over 100 down to 34, and reduce circuit court vacancies to single digits.

Despite having received Federal judicial nominees since March from President Obama and despite having held hearings and reported those nominees in June, not a single Federal judge has been confirmed by the Senate all year. I believe the Senate has to do better.

I mention that because when I was Chairman of this Committee with a Republican President, I moved President Bush's nominees through faster than either of the Republican chairmen did for President Bush, because I did not want to go back to what had been, during President Clinton's time, when 61 of President Clinton's nominees were pocket filibustered by the other side.

I mention that because we tried very hard to have judges looked at as judges and to get out of partisan politics, and I hope we can get back to that. There is absolutely no excuse for not having moved yet. In fact, I notice even the U.S. Attorney recommended by Senator Sessions, the Ranking Member of this Committee, has been blocked. This is despite the fact that we cleared his nomination on the Democratic side of the aisle. This nominee of a Republican has been blocked by the Republican side. We have got to do better than that.

Now, both judicial nominations we consider today come to us with bipartisan support. President Obama's nomination of Judge Beverly Martin to be elevated from the U.S. District Court for the Northern District of Georgia to the Eleventh Circuit has the support of Georgia Senators, Senator Chambliss and Senator Isakson. Senator Isakson and I had a good chat about this yesterday on the floor. Senator Chambliss and I talked with Judge Martin this

morning.

Judge Martin is the fourth of President Obama's circuit court nominees to come before the Committee and the fourth with extensive experience as a well respected Federal district court judge.

When her nomination came to the Senate in 2000, it had the support of Senator Max Cleland, Democrat, and Senator Paul Coverdell, a Republican, also a friend of all of ours who died much too early.

Since her confirmation, she has managed a docket of 3,100 cases. Her nomination to the circuit court is rated unanimously well qualified by the ABA Standing Committee on the Federal Judiciary. I should note that is the highest rating they can give.

Before becoming a Federal judge, she served as the U.S. Attorney for the Middle District of Georgia; as an Assistant U.S. Attorney in that office; and as an Assistant Attorney General in the Office of the Attorney General of Georgia. It is no secret on this Committee that, as a former prosecutor, I love seeing people who have had prosecutorial experience.

So I hope the hearing today can mark a new start in cooperating to fill vacancies. Republican objections have prevented the Senate from confirming nominees reported by the Judiciary Committee for over 2 months, since May 12, including, as I said, somebody sponsored by the Ranking Republican on this Committee, Senator Sessions. There are currently 17 nominees reported by the Judiciary Committee pending on the executive calendar. A dozen have been installed on the Senate executive calendar since before the Fourth of July recess, five U.S. Attorneys, four Assistant Attorneys General, Chairman of the United States Sentencing Commission and others, as well as a number of judges. So I hope we can move forth.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

Senator Hatch, former Chairman of this Committee, former Ranking Member of this Committee, experienced person who, at least once or twice a year, will agree with me on something. I am delighted to have you here.

[Laughter.]

STATEMENT OF HON. ORRIN HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Long-term listener to Senator Leahy.

[Laughter.]

Senator HATCH. It is a privilege to be with you, Mr. Chairman, and I appreciate your leadership of this Committee.

Judge Martin, welcome back to the Judiciary Committee. I was chairing the Committee when you first arrived. We have been proud of your service.

You two nominees for judge, we are very grateful you are willing to serve and willing to participate in our government. We know that there are nice things that come from being a Federal judge, but there are a lot of difficulties, too, and we appreciate your willingness to serve.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you. I would note for the record that Senator Hatch and I have been good friends for decades.

Senator HATCH. That is true.

Chairman LEAHY. And we do enjoy teasing each other, but we have worked together and there has been an awful lot of Hatch-Leahy and Leahy-Hatch legislation that has passed this body. We are going to go, as we normally do, by seniority of the Senators who are here. I appreciate you taking the time. I would note that, to the nominees, if the Senators, after they have introduced you, leave, that is not an indication how they feel about your qualifications. It is just that each one of these three Senators have several other committee meetings going on at this time.

Thank you. Thank you very much for having them all here. Senator Chambliss.

PRESENTATION OF BEVERLY BALDWIN MARTIN, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE ELEVENTH CIRCUIT, BY HON. SAXBY CHAMBLISS, A U.S. SENATOR FROM THE STATE OF GEORGIA

Senator CHAMBLISS. Thank you very much, Mr. Chairman. It is a privilege for me to be here before you and my dear friend, Senator Hatch, Senator Franken to introduce to this Committee Beverly Martin. Beverly is a long-time dear friend, but her father and I go back even further than that, as a brand new lawyer in the Middle District of Georgia about 40 years ago.

You always, as young lawyers, as you know, try to look to the best lawyers around to emulate and to learn from. Beverly's father, her grandfather and her great-grandfather were all lawyers and her father was one of the outstanding lawyers in our state and somebody that I looked to early on to learn from.

So it is, indeed, a privilege to be back here 9 years after I came here to help introduce her before Chairman Hatch, at that point in time, to this Committee, regarding her nomination to the district court bench for the Northern District of Georgia.

Beverly brings a great tradition, not just a family tradition, to the bench. She served as a member of Attorney General Mike Bowers' team at the state level for many years, and, there, I had the opportunity to work with her from time to time, because I did an awful lot of condemnation work and we worked very closely with that group of lawyers at the state level. I knew then what an outstanding person and outstanding lawyer she is.

Beverly then went to become an Assistant U.S. Attorney in the Middle District and, ultimately, the U.S. Attorney, as she was named by President Clinton, and then was elevated to the bench on the Northern District of Georgia thereafter and, as the Chairman noted, she has handled over 3,100 cases during that 9 years, and she is so well respected by not just the judges who work with her every day, but by the lawyers that practice before her, and that is a real credit to her.

She is one of those special individuals and I know Senator Sessions, as a former U.S. Attorney, remembers the weed-and-seed program that was so popular. Beverly was a strong advocate of the weed-and-seed program during her U.S. Attorney days and she started programs in different parts of the district, in Valdosta, Columbus, Macon and Athens, and just did so many great things outside of the courtroom, just like she did inside the courtroom.

She is tough, but she is fair, and that is what I hear from lawyers who practice before her on a regular basis. She replaces another

great Maconite, Lanier Anderson, who was appointed by President Carter back in the 1970's. He has served us well on the Eleventh Circuit and Beverly is going to bring not just a great tradition to the Eleventh Circuit from a family perspective, but she is an excellent lawyer. She is an excellent judge, and she is going to make a fine member of the Eleventh Circuit bench. I look forward to supporting her as her nomination moves to the floor. I thank you again for the opportunity to be here today to introduce her.

Chairman LEAHY. Thank you very much. As I said, I enjoyed meeting her with you. Of course, Senator Chambliss and I have served together on another committee for years, on the Agriculture Committee, when he was chairman and since.

Senator Isakson.

PRESENTATION OF BEVERLY BALDWIN MARTIN, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE ELEVENTH CIRCUIT, BY HON. JOHNNY ISAKSON, A U.S. SENATOR FROM THE STATE OF GEORGIA

Senator ISAKSON. Thank you, Chairman Leahy, Ranking Member Sessions. It is an honor for me to join with the senior Senator from Georgia, Saxby Chambliss, in introducing Judge Beverly Martin. I suffer at an extreme disadvantage when it comes to judicial appointments. I am not an attorney. So I have to set a criteria that may be different in judging people, and there are three things I look for when I consider the judicial appointments. One is knowledge, second is integrity, and the third is judicial activism.

I was called out of a dinner at the Marriott downtown the day of the announcement by the President of Beverly Martin's nomination to the Eleventh Circuit. I received an emergency call, which I rarely get. It was from Mike Bowers, the former Republican Attorney General of the State of Georgia, now a practicing attorney, under whom Beverly Martin served in the Georgia Attorney General's office many years ago.

He said, "Johnny, I just want you to know I heard today that Beverly Martin has been nominated for the Eleventh Circuit. I want to tell you that I have never known a finer practicing attorney, never known a finer prosecutor," which I know the Chairman will identify with that remark, "and I think she will be an outstanding judge in the Northern District."

The last call I received today was from south Georgia, from an attorney by the name of Jimmy Franklin, just to tell me how much he thought of Judge Beverly Martin. But for me, on the case of judicial activism, I tried to look back at her record to find some way to give me an indication of her position on judicial activism and I came upon her testimony when she was before this Committee on judicial activism in her appointment to the Northern District.

If I can, I would like to quote her answer to this Committee.

"Once a case is properly before a court, a judge is obligated to follow the United States Constitution, statutory law and the doctrine of stare decisis, to adhere to the legal precedent. The precept is paramount, because it is necessary to the stability of our system for individuals and commercial concerns to find predictability in our judicial system and anticipate what actions are legally permissible. United States district courts have a limited jurisdiction and

it is the solemn obligation of a judge not to find jurisdiction where it does not exist.”

That was all I needed to know that Judge Martin was the type of judge that I am proud to be able to be before you today and introduce to you as a Georgian, a great justice, and a fine person.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you. Judge, this just elaborates on the very nice things that Senator Isakson said to me on the floor of the Senate. Judge, you have family members here, do you?

Ms. MARTIN. [Off microphone.]

Chairman LEAHY. I suspect two very proud gentlemen. Thank you. I thank all three of you for being here. I appreciate you being here. I know you have to be out—you are welcome to stay, of course, but I know you have all got committee meetings. So thank you very much.

Let us have the three nominees come forward and let me administer the oath, and we can begin.

[Nominees sworn.]

Chairman LEAHY. Let the record show that each of the nominees took the oath and agreed to it. We will start with you, Judge Martin, if you have an opening statement that you would like to give.

STATEMENT OF BEVERLY BALDWIN MARTIN, NOMINEE TO BE UNITED STATES CIRCUIT JUDGE FOR THE ELEVENTH CIRCUIT

Ms. MARTIN. I do not have an opening statement, but I have got some people I would like to thank. On my way walking up here this morning, I remember that it was 35 years ago this summer that I was a summer intern for Senator Sam Nunn. So to be here this morning with both of my Senators from the State of Georgia is a big deal for me and I am grateful to them for being here.

I wanted to mention that in addition to my husband and my father, there are six of my law clerks here today, former, present and future; one that is going to start in 2 weeks. Also, I noticed a couple of my colleagues from my time as United States Attorney, and I appreciate them being here, as well. But most of all, thank you all for having me here this morning.

Chairman LEAHY. You had the privilege of serving with Sam Nunn. His wife, Colleen, was my wife's big sister when she came here. Spouses will help spouses of incoming Senators, and they often become friends forever. My wife has served in a similar position with a number of people. She did it with a young Senator from Illinois named Barack Obama, with Michelle Obama.

Chairman LEAHY. Thank you very much. My mother's parents also emigrated to Vermont from Italy.

Judge Martin, the courts are—and they were set up this way by the founders of the country—they are the one undemocratic part of our government. So they have a special responsibility to Americans who have the least power and greatest need for protection.

Judges are protected in their own decisions by lifetime appointments. You certainly understand that, after 9 years on the Federal bench. But I also think there is a need to show sensitivity to people of different backgrounds, to show equal justice, whether you are coming before a court, whether you are rich, poor or no matter what your political background, no matter whether you are plaintiff

or defendant, to show that they are going to be treated the same.

Can you describe any situation, either as a lawyer or as a judge, in which you have taken difficult positions on behalf of comparatively poor or powerless individuals or members of racial minorities against a large corporation or the government?

Ms. MARTIN. The first thing that comes to mind is criminal sentencing. That is probably the toughest day for any district judge.

It is the worst day in the criminal defendant's life, but it is also the worst day in his or her family's life.

So that is a time when I think it is important really to the rehabilitative process for me to treat the criminal defendant, as well as his or her family, with respect.

In civil cases, a very large part of our docket in the Eleventh Circuit are employment discrimination cases. So I have had some exposure to providing trials to people claiming race discrimination.

Again, I think it is my role to treat the parties and their counsel with respect and provide them with access to the courts.

Chairman LEAHY. Let me talk about a case, a recent Eleventh Circuit case I was reading about in Legal Times, Williams v. Mohawk Industries. That is a case where hourly wage employees brought a racketeering class action against the employer, Georgia Carpet, a flooring manufacturer.

They said that the manufacturer had violated Federal law for years by hiring illegal aliens to keep wages low. The district court denied class certification to the employees, and, normally, the Eleventh Circuit, as in most circuits, the circuit would accept what the district court had done in denying class certification.

In this case, somewhat rare, they reversed it. They remanded the decision to the lower court. Now, obviously, as a district court judge, I know you accept what the circuit has done, but how do you handle those kinds of decisions on class certifications? Is there any rule of thumb or is each one different? How do you handle those?

Ms. MARTIN. Each one is different, of course. I see a lot of securities class action cases. In those instances, every single member of the class really does have the same claim. So the class certification process for those cases is a little bit different than the one that Judge Murphy faced in the Mohawk Industries case.

I have read the case and the primary impression it made on me at the time was that great judges really do get reversed sometimes, because Harold Murphy is probably the most beloved judge in the Northern District of Georgia.

I think it went up three different times, maybe. So beyond that, I am not familiar with the details of the case.

Chairman LEAHY. But how do you handle the issue? You have one come before you on a motion for class certification. Do you treat each one differently or do you have a matrix that applies?

Ms. MARTIN. Well, I have Rule 23. So I go through the Rule 23(a) factors and, as I said, with securities class action cases, that is fairly straightforward; then the 23(b) factors, which I think is where the Eleventh Circuit disagreed with what Judge Murphy had done, if I understand the decision correctly.

But I approach each one differently, but follow Rule 23. Of course, those decisions go up on an interlocutory appeal whether

you certify the class or not.

Chairman LEAHY. But you certainly understand the precedent that a court of appeals may overrule.

Ms. MARTIN. I understand it very well.

Chairman LEAHY. Thank you very much. Senator Sessions, I thank you for your forbearance. I went over time there.

Senator SESSIONS. That is fine.

Chairman LEAHY. Please go ahead.

Senator SESSIONS. Thank you, Mr. Chairman. I was prepared to yield to Senator Hatch or Senator Coburn. Both I know have serious matters on their agenda. I am not sure who.

Senator HATCH. Maybe I could just ask one question of Judge Martin and then just maybe a little bit of comment for Mr. Kappos.

Senator SESSIONS. Please.

Senator HATCH. I want to congratulate all three of you. These are important jobs. I take them very seriously. Judge Martin, like I say, I was chairman when you first came up before the Committee.

Ms. MARTIN. I remember it very well. My father and I speak often of your kindness to both of us that day. It was a highlight for both of us.

Senator HATCH. Thank you. I hope you do not think this question is unkind.

Ms. MARTIN. All right.

Senator HATCH. But I have one question about one of your cases.

That was U.S. v. Farley, which you decided last year. The reason I am concerned about this is I understand that this decision is currently on appeal to the Eleventh Circuit. So I just want to ask you about your decision and how you reached it.

In that case, you found a man guilty of crossing state lines with intent to engage in a sexual act with a child under the age of 12. You found the mandatory minimum 30-year sentence required by the Federal statute to be unconstitutional and a violation of the Eighth Amendment.

Now, I am interested in this decision for a number of reasons, one of which is that this mandatory sentence was established by the Adam Walsh Child Protection and Safety Act, which I introduced in the Senate. Now, you said that the mandatory minimum was grossly disproportionate to the crime, but I was surprised at your reasoning.

You said that no harm was suffered because the predator had not actually had sex with the child. You even observed that, quote, "It was not possible for a child to be harmed because the child was a creation of law enforcement and no real child exists," unquote.

Now, I have some difficulty seeing how either of those observations is relevant, since the crime for which the predator was convicted is defined in terms of the intent to have sex with a child.

Now, Congress made that a crime and imposed a hefty mandatory minimum, as you know, precisely because the consequences of a predator actually abusing a child are so horrific.

Now, with respect, it sounds like you were saying no harm, no foul. But that is certainly not what the Congress thought. Now, your decision suggests that you would have viewed the case differently if law enforcement had actually used real children as bait rather than setting up a sting.

Now, I have to say I was disturbed by the decision, but I have great confidence in you. I would just appreciate whatever insight you can give me about it.

Ms. MARTIN. Well, 18 United States Code Section 3553(a) requires that I look at the nature and the circumstances of the crime committed, and there was a challenge made to the 30-year mandatory minimum.

There is a presumption, as I well understand, that any act of Congress is constitutional. The United States Supreme Court has a test that judges are supposed to apply when there is a challenge, Eighth Amendment challenge made to a statute, and I set out to apply that test, which requires that I look at the punishment for similar crimes or more serious crimes in the same jurisdiction and how other jurisdictions punish similar crimes.

It is a pretty onerous test and I looked at how each of the 50 states treat that crime and what I ran into was the laws are—for example, the law for producing child pornography which involves the molestation of an actual child and then the continuing molestation of that child by the distribution of the photographs of the molestation that can go on for the child's whole life, and the sentence for that was a mandatory minimum 15 years, a cap of 30 years.

In my case, the defendant talked to an FBI agent who pretended to be the mother of a child and he was arrested on the plane. He never left the plane. He waived a jury trial. I convicted him of the 30-year count, which is what I refer to it as, and then there was the Federal statute that criminalizes crossing state lines with intent to murder somebody, murder for hire. There was a statutory cap on that of 10 years.

Senator HATCH. You basically thought the 30 years was excessive.

Ms. MARTIN. It wasn't about what I thought. My effort was to write an opinion applying the test and when I got to the proportionality analysis, as I said, I could not find the words to say that it was not disproportionate.

Senator HATCH. Mr. Chairman, let me just say, I am going to support you, but I did want to hear what your reasoning was. So I plan on supporting you. I plan on supporting you with respect.

Chairman LEAHY. Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman. Thank you, Judge, Mr. Viken, Mr. Kappos. Just a few quick questions. Judge Martin, I heard in your introduction by Senator Chambliss that you were involved in the weed-and-seed program.

Ms. MARTIN. You know the weed-and-seed program.

Senator FRANKEN. Yes. We have that in Minnesota and I have been to some weed-and-seed events, and they seem to be diminishing, the number of them. Is that the case and do you not think we should be encouraging those programs?

Ms. MARTIN. Well, of course, that is policy and judges do not make policy. But I was thrilled with my involvement in the program and the effect it had on some neighborhoods that needed some help throughout my part of the state.

We had summer camps in our weed-and-seed program. Did you know about those?

Senator FRANKEN. They did all kinds of things in different weed-and-seed programs. Basically, it was a way of reducing crime in

these neighborhoods and by doing various things like camps, but other stuff, too.

Ms. MARTIN. We have so many military reservations in Georgia that we could partner with the military reservations and have the children come to the military reservations and spend the night and so they were exposed to all sorts of things they would have otherwise not known about. It was a real highlight for me.

Senator FRANKEN. I am glad you took the initiative to do that. Thank you, Mr. Chairman.

Senator SESSIONS. Are you recognizing me?

Senator FRANKEN. Yes. Mr. Ranking Member Sessions, Senator, sir, from the great State of Alabama.

Senator SESSIONS. We are great.

Senator FRANKEN. I am sorry.

Senator SESSIONS. Ms. Martin, thank you. I hear great things about you. I have talked to a number of people who have known you. So I am very positively disposed about it. I have gotten a lot of calls to that effect. But to follow-up on Senator Hatch's question, to me, there is a danger if a judge feels that a sentence is incorrect, and I can respect that. That is a pretty strong, heavy sentence, 30 years, in this kind of case, even though the man thought, by all bits of evidence, that he was going to have sex with a 12-year-old child. So I think people can disagree on what the right sentence there is.

I am a bit concerned about your leap to the fact that the Eighth Amendment would cover this. I would just ask, first, has there been any other case that you are aware of in which a court has held that a heavy sentence, even a life sentence, violates the Eighth Amendment, which prohibits the imposition of cruel and unusual punishment?

Ms. MARTIN. The test that applied in the case was a United States Supreme Court case, and I, frankly, cannot remember how they came out in applying that test. It sounds so terrible when we are sitting here. I want to be sure people understand.

Senator SESSIONS. Let me just say I know a lot of judges. We have had a previous one this year that has got a little bit of a problem, because he, I would say, was criticized, I will just say it that way, because he did not want to follow one of these sentences. These child molestation cases have very heavy sentences and I think good judges could think that some of them may be more excessive. But Congress, we debated that at great length and we passed that and we take that very seriously. We want to end this problem. But go ahead.

Ms. MARTIN. And I do, as well. I bet, when you were a United States attorney, you prosecuted these folks when the Postal agent was the case agent in the case. I did, as well.

So I am delighted not to be the policymaker in this area, because I think it is a terrible problem and I have no idea how to solve it. As I said in the transcript, when I set out to apply the test, I had no idea it would turn out that way. But I think that is what judges have to do. You have to look at each case fresh and apply the test that the Supreme Court has provided and it comes out how it comes out, and I understand.

My father is probably having a heart attack back there about what I did. This man, there was no evidence he ever touched a

child.

Senator SESSIONS. I understand that.

Ms. MARTIN. And I sentenced him to 20 years.

Senator SESSIONS. I just want to raise the question with you, just basically—go ahead, if I am interrupting.

Ms. MARTIN. No. I just wanted to be sure my daddy knew I sentenced him to 20 years. I did not just let him go home.

[Laughter.]

Senator SESSIONS. Well said.

Chairman LEAHY. Before your father walked out of the room.

Ms. MARTIN. He is not going to vote for me now.

Senator SESSIONS. No, no. Twenty years without parole is a very serious, heavy sentence.

Ms. MARTIN. I am under oath. So it was 235 months, 5 months short of 20 years.

Senator SESSIONS. Very good. Well, I am just of the view that this was a pretty significant or a fairly unusual thing that former Chairman Sensenbrenner, ranking in the House Judiciary Committee, has filed a brief in the case, being concerned that it does violate the congressional authority in that area.

My time is up. I would just say to you that there is a siren call of temptation out there, always, “Well, this is not quite the way I would like it to come out and I would like to do it differently.” The majority of your record is not that way. This is just one of the cases that jumps out at some people, especially since the House has filed a brief, members have filed a brief on it.

I would like your commitment that you understand that it will be your responsibility to serve under the Constitution and under the laws of the United States, as the oath says, and not above it.

Ms. MARTIN. Absolutely. Absolutely. I do impose mandatory minimums all the time, Senator Sessions. I wanted to be sure you knew that.

Senator SESSIONS. Yes. I know that is true and your record demonstrates that.

Ms. MARTIN. Thank you.

Chairman LEAHY. Thank you very much. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman. Let me make one additional comment, if I may, Mr. Chairman, to the judicial nominees. When Senator Thurmond was chairman in here, he—Judge Martin, you are already a judge and, Mr. Viken, you are likely to become a judge.

Senator Thurmond used to say, “If you’re confirmed, do you promise to be courteous,” which translates from South Carolinaese, “If you are confirmed, do you promise to be courteous.”

When I first heard him ask the question, I said, “That is not a very meaningful question. What is anybody going to say but yes?” The nominees dutifully answered “yes” and then he said, “Because the more power a person has, the more courteous a person should be.” Translated, “More power a person has, the more courteous the person should be.”

Sometimes there is a tendency, when you put on that black robe and have all that power, especially lifetime tenure, which Senators do not have, except for Senator Leahy—

[Laughter.]

Senator SPECTER. When you have all that power, bear Senator

Thurmond's admonition in mind. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much. I will resist the response to that. I do recognize Senator Klobuchar, but before the clock starts on her, having Senator Thurmond here was a very interesting thing. I once made a comment on something Senator Kennedy said and I said, "The problem with you guys from the southern states, meaning Massachusetts."

Senator Thurmond sat bolt upright and for 20 minutes, he said, "I'll tell you boys," you boys, "what southern is." And at the end of that 20-minute lecture, we realized Massachusetts may be south of Vermont, but it is not southern.

Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. Congratulations to all of you. I would tell you, Judge Martin, that I have been watching your father back there and he is doing fine.

Ms. MARTIN. Good, good, good.

Senator KLOBUCHAR. He was laughing at the last jokes. He is doing Okay.

Ms. MARTIN. As long as he is still here.

Senator KLOBUCHAR. Yes, that is good. I will say I have appreciated your honest explanation about that case and I think Senator Sessions understands, as does everyone up here, that people may not agree with every decision that you make, but it is looking at your record as a whole, which is very strong.

Also, your explanation here was very good. I would add, which I am sure was mentioned before, that you got the blue slips, which means the go-ahead from the two Republican Senators in Georgia, Senator Isakson and Senator Chambliss, both of whom are well respected here. But thank you for your answer.

Ms. MARTIN. It is a real honor.

SCOTT MATHESON
THURSDAY, MAY 13, 2010
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Committee met, pursuant to notice, at 2:30 p.m., Room SD-226, Dirksen Senate Office Building, Hon. Benjamin L. Cardin, presiding.

Present: Senators Feingold, Whitehouse, Klobuchar, Franken, Sessions, Hatch, and Kyl.

OPENING STATEMENT OF HON. BENJAMIN L. CARDIN, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator CARDIN. The Judiciary Committee will come to order. I am going to acknowledge in the beginning that we may get interrupted with a vote on the floor of the U.S. Senate. So we are going to try to expedite this hearing as quickly as we can, from the point of view that we have a lot of our Senators that want to be heard in introducing their nominees.

Today, the Committee will consider five judicial nominations. I want to thank Senator Leahy for giving me the opportunity to chair this hearing.

Panel one will consist of Scott Matheson of Utah to be U.S. Circuit Judge for the Tenth Circuit.

Let me also mention the three nominees that are before us that will be introduced formally by their home state Senators. Scott Matheson of Utah comes to this Committee with experience of being a prosecutor, a law firm attorney, professor of law, and dean of a law school. And he comes from a very distinguished family of public servants, and I have had the opportunity of serving with his brother, Jim, who has been a member of the House of Representatives. So I want to welcome all five of our nominees. I want to thank them and their families, because I know this is a team effort, for their willingness to, in most cases, continue to serve in a public position of trust on behalf of the people of our country.

At this point, I am going to turn to the members of the Senate to introduce their nominees, starting with Senator Hatch, who has been a very active member of this Committee, a leader of this Committee, and a great friend of all.

Senator Hatch.

PRESENTATION OF SCOTT M. MATHESON, JR., NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE TENTH CIRCUIT BY HON. ORRIN HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Well, thank you, Mr. Chairman, and thank you for your kind remarks. I am quite thrilled here today to be able to present our nominee for the Tenth Circuit Court of Appeals, Scott Matheson.

Scott Matheson is nominated by President Obama to the U.S. Court of Appeals for the Tenth Circuit. He continues his family's dedicated service to our State of Utah and its educational institutions. His father was Governor of Utah, one of the great Governors that we had, and had had great experience in his prior work. Scott brings to this nomination both personal qualities of character and integrity and a variety of relevant experiences. He has

degrees from Stanford, Oxford, and Yale.

His three decades of legal experience includes private practice with the distinguished law firm of Williams and Conley here in Washington; public service as a deputy county attorney, and as U.S. Attorney for Utah, and long-time experience as a very thoughtful scholar.

He has been on the faculty of the S.J. Quinney College of Law at the University of Utah since 1985, where he is currently the Hugh B. Brown Presidential Endowed Chair in law, and he holds that chair.

Over the years, he has taught civil procedure, constitutional law, evidence, First Amendment, and intellectual property. In addition to being in the classroom, Scott also serves the law school as an associate dean for academic affairs and for 8 years as dean of the law school.

He also served on the advisory and governing boards of the Hinkley Institute of Politics at the University of Utah, and the selection committees for different fellowships and prizes granted by the university.

He also served for 7 years on the Committee overseeing the Tanner Lecture on Human Values, one of several nationally and internationally renowned forums sponsored by the Tanner Humanity Centers at the University of Utah.

The Tanner Lectures are given several times a year at renowned institutions, including Oxford and Cambridge, Harvard, Yale and Princeton, and the Universities of Michigan, California and, most importantly, of course, Utah.

The range of lecturers is breathtaking, including Richard Dawkins, Marion Wright-Edelman, and Solomon Ruschke, to Charles Freid, Judge Richard Posner, and Supreme Court Justices Stephen Breyer and, one of all of our favorites, I am sure, Anthony Scalia; and I have to say Breyer is certainly in that category, as well. Utahns are all very proud of this fine institution.

Scott has received a number of awards for his service in this and other capacities, including the faculty achievement and services award from the university and awards for his service to the Federal Bar Association and the Utah Minority Bar Association.

Scott is not the first of President Obama's judicial nominees to come from the world of academia. Scott, however, has a greater variety of experience, including the real world practice of law, especially his service as a Federal prosecutor. He is a man of integrity, ability and dedication, and I personally know him very, very well and have nothing but the highest opinion of him. He is a person who will distinguish himself on the court, as he has in every other endeavor of his life.

By the way, I am happy to see his wonderful mother here today. It was not long ago she went through some trying times and we were all praying for her. She is a wonderful leader in Utah, one of the great women that we have out in our state; and, also, his beautiful wife and other members of the family.

Above all, I am really happy to have his brother here. Jim Matheson has been a Congressman in the House of Representatives for a decade, and I think he is one of the finest people I know and he is just a good person and a hard worker and a very good

Member of Congress.

So I am pleased to introduce this man of integrity and ability and dedication as a nominee to the Tenth Circuit Court of Appeals. Mr. Chairman, I want to thank you for your kind courtesy to me and I naturally expect kind courtesies to all these nominees here today, and I know you are the type that will make sure that happens. Thanks so much.

Senator CARDIN. Senator Hatch, thank you. You are always very cordial in your introductions, and I do acknowledge Congressman Matheson, who is here, who I had the opportunity to serve with in the House.

PRESENTATION OF SCOTT M. MATHESON, JR., NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE TENTH CIRCUIT BY THE HON. RUSS FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. [Presiding.] Call the Committee back to order.

When Senators come back from vote, we will start the hearing again. I am Senator Feingold from Wisconsin, and it is my pleasure to speak in support of Scott Matheson, Jr., who President Obama has nominated to fill a vacancy on the U.S. Court of Appeals for the Tenth Circuit.

I have known Scott as a close friend for many, many years. We first met as students together at Oxford. Scott has a rare combination of intellect, legal knowledge, experience, and probity that makes him perfect for an appellate court judgeship.

I could not possibly recommend anybody more strongly. From 1993 to 1997, Scott served as U.S. Attorney for the District of Utah. Faced with challenging cases, he developed legal positions that revealed his extensive knowledge of the law and unwavering fair-mindedness.

A particularly revealing example is when a U.S. Supreme Court decision, *Hagen v. Utah*, in 1994, threatened the viability of Federal criminal convictions for crimes committed on the Indian reservation in eastern Utah. The Court found that the reservation was a patchwork of mixed state, private and Federal land.

So the issue facing the courts after *Hagen* was whether the Federal Government had jurisdiction when the crimes were committed. Scott recognized that it would have been legally improper to sustain convictions rendered by a court without subject matter jurisdiction, but it also would have been manifestly unfair to void otherwise valid convictions and force victims to go through new trials.

Scott was able to find an answer that honored the Supreme Court decision, but protected all of the otherwise valid convictions, stretching back decades. So in the words of Scott's first assistant, David Schwendiman, with whom my staff communicated, quote, "It was brilliant legal work, but typical of Scott. Scott's excellence was well recognized among his colleagues." According to David Schwendiman, "When it came down to it, Scott was the finest lawyer in the office and, in my view, probably the best tenth circuit

advocate. When we were in the courtroom in the trial that we did together in the tenth circuit, he was truly the person who knew more than anyone else in the courtroom both about the law and the facts. It will be the same if he is appointed to the bench."

There are many judges in the Federal Court of Appeals with excellent

academic credentials, and Scott's match up with the best of them. I know Senator Hatch has already reviewed those, so I will not go over that again. But I am, of course, very aware of his accomplishments. Scott has been deeply involved, as well, in Utah politics, and, in my opinion, he was born to be a judge. Beyond his outstanding intellect and experience, his fair-mindedness and probity make him perfect for the role.

Scott never hesitates to do the right thing, even when it is unpopular. I believe Scott Matheson is an outstanding nominee and will be an outstanding judge, and so I am very pleased that the President has nominated him and I am proud to support him today.

Thank you, Mr. Chairman.

Senator HATCH. Mr. Chairman.

Senator CARDIN. [Presiding.] Senator Hatch.

Senator HATCH. After listening to Senator Feingold, I am starting to have some doubts here.

[Laughter.]

Senator FEINGOLD. That was my only hesitation.

Senator HATCH. No. That is great praise and I am very grateful that you would take time to come and talk about our great nominee.

Senator CARDIN. Thank you, Senator Franken.

We now will proceed to our first panel, which will be Scott Matheson.

[Witness sworn.]

Senator CARDIN. Mr. Matheson, you may proceed. But as is the tradition of our Committee, if you have family members that are with you, it would be appropriate to introduce your family. We know this is a family effort.

STATEMENT OF SCOTT MATHESON, NOMINEE TO BE UNITED STATES CIRCUIT COURT JUDGE FOR THE TENTH CIRCUIT

Mr. MATHESON. Well, thank you very much, Mr. Chairman. And it's an honor to be here and I'm delighted to introduce family members who are with me this afternoon.

I will start with my wife, Robyn, who is seated directly behind me. And to her left is my daughter, Heather. My son, Briggs, is here in spirit, but he's a first year law student at Stanford and I told him he had to stay in California and go to class. And I hope I can get some Committee support on that decision, because he wasn't happy about that.

My mother is here. She's been mentioned several times during the course of these proceedings. She arrived in Washington last night, promptly slipped at the Metro and dislocated her finger. But she's OK. I just hope that isn't an omen for the hearing. But I'm pleased that she could join us.

I'd like to mention my father. We lost my father almost 20 years ago. We think about him and we miss him every day and especially on this day.

My brother, Jim, was here earlier. He was introduced. He had to ask to be excused. And I'd like to mention my brother, Tom, who lives in Tucson, Arizona, and my sister, Lu, who lives in Salt Lake City.

Also joining us today are many friends, colleagues, former colleagues, students, former students, and, via online, many colleagues

and friends out in the State of Utah, and I appreciate their interest and support.

I'd also like to thank and acknowledge the introductions on my behalf by Senator Hatch. That's the kind of introduction that would make anybody's mother blush, and I think she did, and then Senator Feingold did the same thing.

So I appreciate very much what both of them had to say, and especially the bipartisan support that those statements represent.

With that, Mr. Chairman, I'll turn it back to you and I look forward to answering the Committee's questions.

Senator CARDIN. Well, thank you. And we certainly do appreciate the introductions and support that has already been shown on this Committee.

Let me start with a question I think is relevant, considering that the President recently nominated Elena Kagan to the Supreme Court and then she would be coming to the Supreme Court without judicial experience; that your nomination is to the court of appeals, the appellate court, and you have not served in a judicial capacity. One is very impressed with your background and your experience in the positions that you have held in the legal community.

Do you think it is a concern that you have not served on the district court or in a circuit court going to the court of appeals?

Mr. MATHESON. Well, thank you, Mr. Chairman. I am pleased to be able to address that question.

I would start out by saying that I feel that I have been extremely fortunate in my career to have some extraordinary opportunities, ranging from private practice at a leading law firm to prosecuting in our State courts in Utah, to serving as the U.S. attorney, serving as dean of a law school, and participating in a multitude of law reform efforts.

I couldn't have asked for better opportunities than that. It's been a very satisfying career up to this point, and I think that that blend of experience and those opportunities to make judgments and to work hard on legal issues and to work with others on a variety of law-related projects will serve me well on the bench.

And I think that those experiences will serve as a substitute, I suppose, for having served as a judge. I understand that that's very good and relevant experience leading into a position of this nature.

Senator CARDIN. As a judge, you have to decide cases based upon the law. But the oath that you take indicates that you will execute justice to the poor and to the wealthy, that there be no distinction.

The fairness of our system sometimes is skewed when someone does not have the ability to pursue their case in court. How do you interpret your position as a judge carrying out the oath that you would take to dispense justice equally to the poor?

Mr. MATHESON. Well, I think, Senator, that the oath requires a critical quality, and that quality is impartiality. And it also means that a judge has to have a full commitment to the rule of law, to impartial application of law to the evidence that has been admitted in the particular case, a commitment to procedural due process, and to open mindedness.

And I think it also requires deference to the other branches of government and, also, I think, constant vigilance to ensure that the law is applied and that the judge's personal and political views are

not involved in the application of the law to a particular case. I think if the judge follows those principles, that equal justice and meeting a judge's responsibilities and, most importantly, as you started out, meeting the oath will be fulfilled.

Senator CARDIN. I am not familiar with Utah, I am with Maryland, as to the responsibilities of lawyers to participate in pro bono and to provide help to those who otherwise would be denied access to our courts.

Do you see a role that the courts can play in promoting adequate representation for all people in our system?

Mr. MATHESON. I think there is, Mr. Chairman. First, let me say that the Utah Bar has a strong record in this area and the legal community in my State has stepped up and fulfilled the responsibility that you just described in many, many ways.

I've had the privilege to participate in a number of those activities, such as the And Justice for All campaign in our community that supports our legal services agencies. As dean of the law school, I was involved in developing a pro bono initiative, which matches up students with practicing lawyers to meet under-served legal needs of our community. And our judges in the State have stepped forward and encouraged programs and lawyers to participate in these activities.

And I feel that I've been part of that tradition and to the extent that it is consistent with the judicial role, would like to continue in that respect.

Senator CARDIN. Thank you.

Senator Hatch.

Senator HATCH. Let me just ask one question, and it is an important one, certainly, and we are welcoming you to the Judiciary Committee of the U.S. Senate. And I want to thank you and your family for your commitment to service to our State and to our country, as well.

Let me just ask you a question concerning judicial philosophy, because I know that this has to be asked. I understand that to mean your understanding of the power and proper role of judges in our system of government involves judicial philosophy.

Now, in 1991, for the 200th anniversary of the Bill of Rights, you wrote a piece for the Salt Lake Tribune arguing that, quote, "There is an unmistakable link between our established constitutional values and basic human needs," unquote.

Because you referred to, underlined, constitutional values, that naturally raises this question—whether judges, as opposed to legislators, may act to help meet those needs.

For example, one scholar has argued that constitutional provisions, such as the guarantee of equal citizenship, make the Constitution literally a generative source of substantive rights. Now, that sounds as if judges can recognize new rights that they think will meet human needs.

Would you care to comment on that?

Mr. MATHESON. Yes. Thank you, Senator Hatch, for that question, and I think it raises a very important issue.

I would say, first of all, that I have never taken the position that you just described and that the provision of opportunity mentioned in the article that you just described is a responsibility for the legislature

to address.

I've always viewed the Constitution as providing for protection for individual rights against government interference as opposed to providing affirmative rights, and that has been my consistent position as a constitutional law teacher and scholar.

I think you put it well last week in the speech that you gave to the Cato Institute, where you said that it's important to recognize the principle that it isn't judges who control the Constitution, it's the Constitution that controls the judges, and that resonated with me. I believe in that principle and it's one that I would take to the bench.

Senator HATCH. Well, thank you. If we have any other questions, we will submit them in writing.

Mr. MATHESON. Thank you.

Senator CARDIN. Thank you.

Senator Feingold.

Senator FEINGOLD. Nothing.

Senator CARDIN. Senator Kyl.

Senator Kyl.

Senator KYL. Thank you, Mr. Chairman.

Let me first begin by asking you a question about your book, *Presidential Constitutionalism in Perilous Times*. You argued, and I am quoting here, "The Presidency requires a constitutional conscientiousness that was lacking in the George W. Bush administration that must be inculcated in the future."

Could you give me some examples?

Mr. MATHESON. Well, my concern that was expressed in that statement, Senator, is a separation of powers concern and the relationship between separation of powers and individual rights.

The book, by the way, is a book about several Presidents that faced security and liberty interests in times of war and national security threat.

Senator KYL. Let me just get to the point here. You are accusing them of not caring about the Constitution. Constitutional conscientious, a lack of consciousness about or thought about or concern about. That is kind of a tough charge against people who tried very hard to be good public servants.

Can you give me an example?

Mr. MATHESON. Well, the examples talked about in the book occurred during the first—mostly during the first term of the Administration and had to do with the lack of collaborative policymaking effort in the areas of torture, national security surveillance, and detention. And the analysis speaks mostly to the question of why the Administration didn't work more closely with Congress in developing those policies.

Senator KYL. With all due respect, though, if the President has constitutional authority to execute a war, it may not be a good idea or good policy not to communicate more robustly with the Congress, but that doesn't mean that it lacks constitutional conscientiousness or, in other words, that it is overriding its powers.

Let me just give you an example of what I thought you were getting at. You wrote that when President Bush issued his November 13, 2001 military commission order, he claimed lawmaking, adjudicating, and prosecuting authority, conflating separation of powers

under the commander-in-chief mantel. Historically, this planting of executive, legislative, and judicial powers in one person or, even in one branch of government is ordinarily regarded as the very acme of absolutism.

Now, are you contending or did you contend in that book that the President, in the exercise of his authority as commander-in-chief of our armed forces in the middle of a military conflict, must require Congress' approval when dealing with foreign enemy combatants on enemy soil?

Mr. MATHESON. Senator, let me try to clarify that point a little bit more. What I was trying to get at with respect to military commissions, which eventually was recognized by the Supreme Court in 2006 in the Hamdan case, is that the President ended up acting unilaterally in establishing the commissions and, as it turned out, under the Uniform Code of Military Justice, there was a Congressional limitation on how those commissions could or should be established.

And that was challenged and then, of course, several years later, the Supreme Court struck down the commissions——

Senator KYL. But the Supreme Court did not strike down the President's authority to establish a military commission.

Mr. MATHESON. Well, they left that question open.

Senator KYL. Right. But that is what you were criticizing him of doing here, of setting it up. Now, there may have been some infirmities in it, and it may have been a better idea for him to—and, in fact, ultimately, Congress did work with him and modify it somewhat and this Administration currently believes that we can operate under that authority.

So, part of what you wrote here suggests that he does not have the authority to do it. That is the thing that I am wondering about. It is not maybe that it was not a great idea, it is exactly how he did it or that he should have consulted with Congress.

Mr. MATHESON. Well, Senator, I think what I was trying to suggest is that, as the Court explained in Hamdan, we didn't have a situation where Congress had not spoken. Congress had spoken. And if we were in the hypothetical situation where Congress had said nothing on this issue, it's in that context that the Court left the question open whether the President could act.

But even in that context, Justice Kennedy was very careful to point out that an executive establishment of a court and the rules of that court and the sanctions of that court should raise issues of constitutional concern concerning separation of powers. That's the point I was trying to make.

Senator KYL. You argued, from the same source, "The executives claimed that it could arrest and lock up individuals suspected of terrorist ties without charge, without counsel, without due process, and without any prospect of release until the war on terror is over evaded the rule of law in a war that is supposed to preserve the rule of law."

Did it turn out that the Supreme Court agreed with you?

Mr. MATHESON. Well, they did, actually, up to a point in the Hamdi case.

Senator KYL. Did not the Hamdi court say that you could hold a prisoner until the end of the conflict?

Mr. MATHESON. They did, but not without the provision of a due

process hearing to challenge the validity of the detention.

Senator KYL. So what you are saying is they are only without due process, as later the Hamdi court ruled—in other words, you do not deny that the President has the authority to hold and to arrest, to lock up, as you put it, terrorists without charge.

Mr. MATHESON. Well, I would include the issue of charge and the validity of detention as part of the due process consideration.

Senator KYL. So you think a person has to be charged, that a terrorist who is captured on a battlefield has to be charged with a crime?

Mr. MATHESON. No. What I was trying to explain is that a person in Hamdi's position—of course, he was a citizen, we know.

Senator KYL. Right.

Mr. MATHESON. Would have an opportunity to contest the detention and, as part of contesting the detention, the reason for the detention would, I think, be part of that discussion.

Senator KYL. Well, that is different from what you said. They do have the right to contest and there is a review even under the original authority that the President exercised with respect to terrorists held at Guantanamo on status.

But what you are saying here is that the executive's claim that it could arrest and lock up individuals suspected of terrorist ties without charge and without counsel—now, you say without due process, that later got interpreted—and without any prospect of release until the war is over evaded the rule of law.

But the Court says that all three of those things are appropriate.

Mr. MATHESON. Well, I suppose that, Senator, I'm trying to put those concepts together and I see a due process interest maybe a little more broadly that you're suggesting.

But I would cite to the Hamdi case as validating that point.

Senator KYL. I would cite to the Hamdi case as contesting it.

I am over my time. I just had one other series of questions, but I am happy to yield.

Senator CARDIN. Senator Whitehouse.

Senator WHITEHOUSE. First of all, welcome, Dean Matheson. It is good to have you with us. You served as United States attorney.

We have, obviously, confirmed you before for positions of significant responsibility, and I welcome you back.

Could you describe a little bit the nature and extent of your appellate court practice during the course of your career?

Mr. MATHESON. Well, I'd be happy to do that, Senator. And it's good to see you again. We overlapped as U.S. attorneys, and Senator Whitehouse was clearly one of the leaders of our U.S. attorney group. So it's good to be back with you this afternoon.

Senator WHITEHOUSE. He only says that now.

Mr. MATHESON. As to your question about appellate practice, as the U.S. attorney, I argued a number of cases before the Tenth Circuit.

Senator Feingold described one of the more significant cases involving the preservation of a multitude of convictions against collateral attack that were being challenged as the result of a Supreme Court case. And we worked very closely with the Justice Department, because it was a challenging issue.

I argued other cases before the Tenth Circuit, including an en banc case involving a Fourth Amendment issue, and I argued a

case that I was also involved as the trial lawyer. It was a homicide case that we tried in Federal district court in Salt Lake City. And what made the case particularly interesting is it was the first case in the history of our state where we used two juries, because of an evidentiary issue.

There was a problem under the Supreme Court decision of *U.S. v. Boutin*, and rather than severing the cases, we tried them together, and that was an interesting experience and we took that case up on appeal to the tenth circuit.

I have to say that my practice experience before that court has been some of the most professionally satisfying of my career. I thoroughly enjoyed it. It's how I've gotten to know that court and come to respect it so much and why it's such an honor to be nominated to serve on that court.

Senator WHITEHOUSE. Well, you have magnificent accomplishments and I am delighted that you are here. I wish you well.

My last question is how many of you there are who are sixth generation Utahans.

Mr. MATHESON. Well, you'd be surprised how many there are.
[Laughter.]

Senator WHITEHOUSE. I will leave it at that.

Senator CARDIN. Senator Franken.

Senator FRANKEN. Thank you, Dean. I am very impressed that you have taken time from your work as a professor and a dean to serve both as a local prosecutor and a U.S. attorney, as Senator Whitehouse mentioned.

What impact do those experiences have on your understanding of the criminal justice system and how will that impact or influence you, if you are confirmed, at the appellate court?

Mr. MATHESON. Well, I've learned a great deal from those experiences and I think I'll mention just a few of the lessons learned. But I think one of the most important is that I have great confidence in our system of criminal justice in this country at both the state and Federal levels.

For one thing, we have such a strong bench in our state, as Senator Hatch knows, in the state courts and the Federal courts, just outstanding judges.

But perhaps most important is a sense, a very deep sense of how conscientious and how committed all the participants in the process almost always are, very professional, take their roles very seriously, whether it's a prosecutor, a defense attorney, a clerk, jurors.

I think that there's a seriousness that is needed in the criminal justice system and I've seen it in action, and I have a lot of respect for each and every person who is involved in that process, because they come to it each day and they come to it to do as good a job as possible, because they recognize that whatever their role is, if they do it well, that contributes to how effective the system is. So I came away from experience as a prosecutor and as a U.S. attorney with that lesson in mind.

Senator FRANKEN. As Senator Cardin referenced, you have written about the importance of responding to the legal needs of low income and middle class people in our society. How did you develop your commitment to access to justice? Is there any one series of events or is this something that you observed or a value that you

got from your parents?

Mr. MATHESON. Well, thank you, Senator. I think I'd start out by saying all of the above. I think growing up in my family, we were always taught about commitment to service. That was inculcated early on, but that continued through law school and during the early years of practice and it's just always been a part of my commitment, my priority, and what I've wanted to do.

And I've had some terrific opportunities to participate in that area, going back quite a few years, when I was actually quite a young lawyer. I was asked to serve on the Legal Aid Society of Salt Lake City and became the president of their board.

And during the time I served with them, we developed a domestic violence program for our community that I think is a model to this day and I'm very proud of having been involved in programs like that.

Senator FRANKEN. Well, thank you. I have heard enough. No more questions. And you are very impressive, sir. Thank you.

Mr. MATHESON. Thank you, Senator.

Senator CARDIN. Just as a follow-up to Senator Kyl's point, the book that Senator Kyl was referring to, *Presidential Constitutionalism in Perilous Times*, you analyzed Presidents, if I understand it, Lincoln, Wilson, Franklin Roosevelt, Truman, and George W. Bush. That was all five, I guess, that you were comparing. And then you draw a conclusion, which is very similar to the 9/11 Commission's report, that I just really want to put in the record, because I agree with it and there might be some interest in that, that Presidents generally have focused on national security in times of crisis and not on civil liberties, and they need to focus on both, which is exactly some of the findings of the 9/11 Commission. I would hope that I will find the time to be able to read that book. It sounds very interesting.

Mr. MATHESON. Thank you.

Senator CARDIN. Senator Kyl, did you want a second round?

Senator KYL. Yes, I do, Mr. Chairman. I have a set of questions. Just as a final point, and maybe since I asked you if you could give me some examples, that might have caught you just a little bit unawares, I will just ask a question for the record and you are free to take time and provide a written answer, if you would like to do that.

But the final point on this question, the little debate you and I were having about Hamdi and so on. Assume that there is an initial determination of status and that there is an at least one time habeas review, which the Court said would exist.

Do you believe that criminal charges, provision of counsel, and some other prospect of relief is required for due process or required by due process for foreign terrorists who are captured on the battlefield and detained in place like Guantanamo?

Mr. MATHESON. Well, Senator, as you'll recall, Justice O'Connor addressed, in part, what she thought due process might require, but didn't go into great detail on that issue and I think that issue may still be with us up to a point in terms of how detainees—and, again, the distinction in that case was drawn between a citizen detainee as opposed to a non-citizen detainee.

So I think my answer, Senator, would, as so often happens in

these matters, depend on a combination of facts and circumstances and if asked to confront it in a judicial capacity, would do so with an open mind.

And these are difficult issues, as you know. They've been debated back and forth now for quite a number of years and it has continued into this administration.

Senator KYL. Did the habeas or the resulting requirement for habeas depend upon citizenship status?

Mr. MATHESON. Well, as you know, after Hamdi, there were other cases and there was the Rasul case, which recognized a habeas opportunity for the Guantanamo detainees, but under the Federal habeas statute.

Then we had legislation that stripped jurisdiction for habeas review, but the administration did institute the combat status review tribunals. But then we moved up to the Boumediene case, which has resolved some issues, but raised several others.

So we're talking about a fluid situation in this area.

Senator KYL. But further established the habeas right.

Mr. MATHESON. In Boumediene.

Senator KYL. Right.

Mr. MATHESON. Yes.

Senator KYL. Let me just switch total subjects. This book Professor Carlin co-authored, I am just going to quote from it, argued that interpreting—I am quoting now—“Interpreting the Constitution requires adaptation of its broad principles to the conditions and challenges faced by successive generations. The question is not how the Constitution would have been applied at the founding, but rather how it should be applied today in light of changing needs, conditions, and understandings of our society.”

Are you generally familiar with that?

Mr. MATHESON. Well, I haven't read that book, Senator, or what she wrote.

Senator KYL. Well, I would just ask you what you think about it, then, or do I need to repeat it?

Mr. MATHESON. No. I think I understand the question and I hope I can be helpful with a response.

I view the Constitution as establishing, in its text, and everything, I think, starts with the text, but establishing a structure of government and a set of relationships within and between governments and between the government and individuals.

I think those principles were established at the beginning and that the framers intended that document and those principles to endure and to serve us in addressing situations that would be new and unanticipated, and I think that that document has served us well in that respect.

I don't see the structure or principles changing. I see circumstances that have to be confronted as changing. I recently was reading the Second Amendment case, the majority opinion in Heller, and Justice Scalia was responding to a claim that the Second Amendment should only apply to those arms that were in existence in the 18th century. And, of course, he rejected that claim and pointed out that the First Amendment has been applied to modern forms of communication and the Fourth Amendment has had to be applied to modern forms of search, and the Second Amendment,

likewise, has to be interpreted in light of new forms of arms, and I think that that approach is a sensible approach.

Senator KYL. Creative lawyers, of course, will come up with an infinite number of new circumstances. I agree with you that circumstances change and, also, even if they do not, lawyers will think of new ways of presenting cases on behalf of their clients. But the word, also, “needs” was in here, in light of changing needs, and I was just thinking, for example, of the free exercise of religion clause and was wondering if you could maybe just give me an idea about how you think there might be a changing need that would require a different interpretation than how the Constitution would have been applied at the founding.

And, again, that may be unfair just to put you on the spot.

Mr. MATHESON. Well, no, Senator. It’s a great question. I suppose my initial reaction to it is that I understand what changed circumstances are, but I’m not sure I understand what a changed need is.

Senator KYL. I kind of was thinking the same thing. Maybe that is something you and I might agree on.

Mr. MATHESON. Well, I’ll take it then.

Senator KYL. Thank you very much.

Mr. MATHESON. Thank you, Senator.

Senator CARDIN. Does any other member of the Committee wish to inquire?

[No response.]

Senator CARDIN. If not, thank you very much and that will complete your testimony and questioning.

Mr. MATHESON. Thank you, Mr. Chairman. Thank you to the Committee. It’s been an honor to be with you today. And thank you, again, Senator Hatch, for your kind words.

Senator CARDIN. We also, again, express our appreciation to you and your entire family.

MARY MURGUIA
THURSDAY, JULY 15, 2010
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 4 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Richard J. Durbin, Chairman of the Committee, presiding.

Present: Senator Kyl.

OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Good afternoon. I apologize for being a minute late. I was down at the Appropriations Committee.

This is the first nominations hearing we have held since the Elena Kagan hearing, and I hope it will be a little shorter.

We have five outstanding nominees with us today and I commend the President for sending their names. All of today's nominees have the support of their home State Senators, a testament to the President's commitment to working with the Senate to identify talented and successful people for the Federal bench.

The first panel will feature Mary Murguia—I hope I am pronouncing that correctly—a U.S. district court judge in Phoenix, who has been nominated to serve on the U.S. Court of Appeals for the Ninth Circuit.

I now ask my colleagues—well, I will after I first recognize Senator Kyl, who I believe has a similar introduction.

Senator Kyl.

PRESENTATION OF MARY HELEN MURGUIA, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT BY HON. SENATOR KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Thank you, Mr. Chairman. It is my pleasure to introduce to the Committee Mary Murguia. Judge Murguia is currently a Federal district judge in the State of Arizona. She has served on the bench there since the year 2000, and she has been nominated by the President to serve on the ninth circuit court of appeals.

Senator McCain joins me in urging the committee's strong support for her nomination, but he could not be here today.

Just a few words to introduce Judge Murguia to the committee, though, of course, her extensive resume is on file with us.

In the 10 years that she has served on the bench in the State of Arizona, she has presided over nearly 4,000 cases to verdict or judgment; has presided over nearly 60 trials, including over 50 jury trials, to verdict.

Mr. Chairman, I talked to her colleagues on the Federal district court bench in Arizona and litigants who appeared before her and asked whether they believed that she gave every litigant a fair chance in court; and, to her person, they all said that her reputation is one of fairness, of equity, of blind justice, of doing the best that she can in each case, and, in all cases, approached the job of judging with exactly that kind of spirit that we would ask for in the judges that we have before us.

Her experience before being on the Federal district court was primarily

in the area of service in the Department of Justice and in the office of the U.S. Attorney.

But her most recent experience, from 1999 and 2000, was to serve as the director of the executive officer for United States attorneys.

And as everyone here who is familiar with this knows, that is the individual responsible for the oversight and support of the 94 different offices of U.S. attorneys around the United States, about 5,000 people in all, plus another 5,000 support staff and administration and appropriation of about \$1 billion.

Prior to that time, as I said, she served in the United States attorney's office for the district of Arizona, among other things, arguing 15 cases and being involved in over 20 appeals before the ninth circuit. She was deputy chief of the criminal section for 4 years, from 1994 to 1998, and had a variety of other experience in that office.

I would note that her very first experience out of school was in the county attorney's office in Kansas, where she was, for 5 years, in there as the senior trial attorney in the sex crimes unit and trial attorney in the major crimes division.

Just one other note of personal background, Mr. Chairman.

Judge Murguia's brother, Carlos, is the first Latino to serve as a Federal district judge in the State of Kansas and the two Judge Murguias—Judge Murguia, I should also point out, Judge Mary Murguia, was the first Latina to be appointed to the Federal district court in Arizona, and she and her brother, Carlos, are the only brother and sister sitting as Federal judges in the United States.

I do not think that she will be disqualified from that if she moves on up to the ninth circuit court of appeals. We will see that they retain that distinction.

In any event, it is with great deal of pleasure that I urge her confirmation before this Committee and look forward to her testimony.

Senator DURBIN. Thank you very much, Senator Kyl.

Now, since we have a nominee for the U.S. District Court, Judge Murguia—

Senator KYL. Circuit Court.

Senator DURBIN. Pardon me. Circuit court—and then district court nominees, we will have two panels.

The first panel will be Judge Murguia, and I ask her, if she would, please, approach the table. And we have a standard oath that is administered.

[Nominee sworn.]

Senator DURBIN. Thank you. Please be seated. Let the record reflect that the nominee answered in the affirmative.

The floor is yours.

STATEMENT OF HON. MARY HELEN MURGUIA, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Judge Murguia. Thank you, Mr. Chairman. Thank you, Senator Kyl. I do not have any formal opening statement. There are some acknowledgments that I would like to make, if I can.

First, I would like to thank President Obama for this honor, for his trust and confidence in me in nominating me to this position as judge on the ninth circuit court of appeals.

Also, I would like to thank Senator Kyl for his extremely kind and generous remarks in his introduction of me here today. I would

like to thank both Senator Kyl and Senator McCain for their support of me throughout this process. I am very grateful to them both.

There are two people who are not here today that I would like to recognize. Those two people are my parents, Alfredo and Amalia Murguia. They were actually here 10 years ago almost to the day for my confirmation hearing for the district court position.

Unfortunately, my father has passed away and my mother suffers from Alzheimer's and could not be here. But both my parents came to this country from Mexico to pursue the American dream, and my father worked for over 35 years as a steel construction worker for the Kansas City, Kansas Structural Steel Company. My mom and my father raised seven kids in a very working class neighborhood of Kansas City, Kansas.

And six of their seven children attended college. Four of us went on to graduate from law school. And my presence here today before this distinguished is really an honor to them and a tribute to them. I do have some family members that are here today, if I could introduce them. First, I guess I will start with the judge, my brother, Carlos Murguia. He is a district court judge in Kansas. His wife, Ann, who is a council member for the unified government in Kansas City could not be here. She is my sister-in-law. They have three children, Wyatt, Thomas and Isabella Grace, who also couldn't be here.

My brother, Alfred, lives and works in Kansas City. He has three children who are a little bit older. In fact, Senator Durbin, his oldest child—I'll say his oldest kid—Ryan, who is my nephew, I think, is on his way here. He recently graduated from Northwestern Law School and is studying vigorously for the bar exam, which is in less than 2 weeks, and he will be starting with the DOJ honors program in the fall.

His brother, Nick, lives and works in Kansas City. He graduated from Tulsa University. My niece, Kelly Murguia, just recently graduated from Brown University. She graduated from Brown in May and she is undergoing a very intense program for Teach for America as we speak and will be starting in that program this fall.

I would also like to introduce my brother, Ramon, who is a lawyer in Kansas City. He is on the board of trustees for the Kellogg Foundation, and really the first in our community to graduate from Harvard Law School. His wife, Sally, who is a lawyer, could not be here today. He has two children, my nephew, Miguel, and his sister, my niece, Amalia, also could not be here today. But all the kids are here in spirit, and I appreciate their support.

My sister, Janet, is president and CEO of an Hispanic civil rights organization based here in Washington, D.C., and she is my twin sister and I am glad that she is here supporting me, as well.

And there are two people who couldn't be here, my sister, Rosemary Murguia, my sister, Martha Hernandez. They care for my mother and, unfortunately, could not be here today.

I have a number of friends here today who've traveled here. My friend, Bea Witzleben, who is an assistant U.S. attorney in Philadelphia. We worked at the Department of Justice together. My friend Margaret Epler, who works for the ninth circuit, is a lawyer for the ninth circuit court of appeals.

My cousin, Lloyd Murguia, who is currently working for Congressman Gonzalez out of Texas. And I know that there are very— a number of former associates of mine with the Department of Justice, and a law school friend of mine here today, and there are numerous friends and family who are watching and I appreciate their support.

Thank you for letting me make those acknowledgments. I'm ready to answer any questions that you all might have.

Senator DURBIN. Thank you very much. And let me just say that the story of your family is an inspiration. It is not just an immigrant story. It is an American story, and the decision of your mother and father to come to this country has made this a better nation, as we can tell from your service and the contributions which all of your family have made, which you have alluded to in your introduction. So I am touched by it, being first generation American myself and presiding over this Judiciary Committee hearing. It is a reminder of who we are and, at times, we need that reminder.

I would like to, if I could—

Judge MURGUIA. Thank you, Senator. Thank you.

Senator DURBIN. Of course. I would like to just ask a substantive question or two. When you reach the circuit court level, you have to expect some serious questions and I hope you will bear with me.

Judge MURGUIA. Of course.

Senator DURBIN. In the 1980s, Congress passed a law to address the crack cocaine scourge in America. History shows that we may have gone too far.

We established sentencing guidelines for crack cocaine that were 100 times the standard used for powder cocaine. It has resulted in what many consider to be unfortunate outcomes, many even unjust. Having voted for that legislation, at a time, I can tell you that we were in just mortal fear that this new narcotic would come in dirt cheap, highly addictive, destroying lives and the lives of children who were born by the addicts. And so we reacted with a 100-to-1 sentencing standard.

Now, this committee, in an extraordinary bipartisan effort, has reduced the disparity in a bill that we passed from 100-to-1 to 18-to-1. Some may argue it should be 1-to-1, which is my position, but it is the nature of a compromise that we have tried to come down to a level of 18-to-1, which has passed the Senate.

Can you share your views on the crack/powder disparity and can you tell me what Federal judges can do, if anything, to reduce the disparate impact that criminal laws such as this might have on the poor and minorities?

Judge MURGUIA. Well, Senator, Mr. Chairman, thank you for your question. I think the current sentencing structure post Booker gives the judges a great deal of freedom in fashioning individualized sentences for each defendant based on their history, characteristics, and the facts and circumstances surrounding the case.

And so I have found, in my experience, that the post Booker sentencing structure allows us to take into consideration all the aspects of everyone's background and their experience—I'm sorry—their background, their criminal history, and the facts and circumstances surrounding the case. And their history, we have to evaluate their personal, social, and criminal history when we sentence.

Obviously, the guidelines, the United States sentencing guidelines are important and they need to be respected. They provide a very important framework and a fair process in evaluating each case and allow—they are an important tool to ensure fairness among similarly situated defendants.

So I think our current sentencing structure, hopefully, takes all of that into account.

Senator DURBIN. Have you had any experience, any professional or legal experience with this sentencing disparity?

Judge MURGUIA. I have not.

Senator DURBIN. I will not pursue that any further, but I thank you for your response there.

You did have a Fair Labor Standards Act case, called *Stickle v. SCI Western Market Support Center*, in which the plaintiffs alleged their employer failed to pay them adequate wages. The employer filed a motion to dismiss under the *Twombly* standard, but you denied the motion and ruled the case could go forward.

What has been your experience applying the new standard set forth in the *Twombly* and *Iqbal* cases? Have you or your colleagues had any cases in which plaintiffs would have prevailed under the old standard, but had to be dismissed under this new Supreme Court standard?

Judge MURGUIA. I don't—just based on my experience, *Twombly*, the effects of *Twombly* are still being set forth, I think, as time passes. It hasn't been into effect for a long time, that I know of any studies that have happened.

But in my experience, I think it just allows the courts a good ability to determine whether or not the cases are meritorious, that they rise above a pure speculative level, if there's a plausible claim. The *Stickle* case is currently ongoing and I allowed it to go forward. I thought it was the right decision to do. So I think it also allows for a fair process.

Senator DURBIN. When the Supreme Court overturned the 50-year precedent of *Conley v. Gibson* and raised the bar for filing such complaints in Federal court, many believe that it made it more difficult for some workers, consumers, and victims of discrimination to proceed with their lawsuit.

Your decision in the *Stickle* case appears to have given that plaintiff another day in court, at least an opportunity to proceed. Do you feel that this new standard makes it more difficult for petitioners or plaintiffs to prevail in these types of cases?

Judge MURGUIA. I don't know that it makes it more difficult at this point.

Senator KYL. Thank you, Mr. Chairman.

I have selected four questions in disparate areas to ask you, and so let me just take them one at a time here.

The first has to do with reassignment of a case, the controversial Arizona case of *Chamber of Commerce v. Candelaria*, the case involving the Arizona statute imposing sanctions on employers who hire illegal immigrants.

According to an Associated Press article December 11, 2007, you had originally been assigned to that case and, according to the article, you reassigned the case back to Judge Wake.

Can you tell us—and this case was controversial, I will tell my

colleagues, and has now been taken by the U.S. Supreme Court after the lower court decision was unanimously upheld.

Can you tell us why you reassigned the case, Judge?

Judge MURGUIA. Certainly, Senator Kyl. That—I reassigned that case based on our local rules involving assignment of cases and transfer of cases. That case actually had a history in our court.

Judge Wake had been presiding over the original version of that case for about 6 months. There were issues regarding a deadline. I think the law was going to go into effect in January.

But Judge Wake, in the 6 months that he had the original version, an almost identical version of the case that was later refiled, had a trial on the merits, due to the request for a preliminary injunction; had considered and had several days of hearings regarding the motions to dismiss; and, ultimately, I think with about 20 days left before the law was to go into place, made a ruling. He had to make a ruling on that case, and found that issues surrounding standing prevented him or you didn't need to go to the merits, because there was an issue regarding standing in that case. And so he issued his ruling and issued judgment.

The parties, instead of appealing or filing a motion for reconsideration, simply seemed to take guidance from his order and refiled the case within 2 days.

That case, which was almost identical to the original version of that case, was eventually assigned to me. When I saw the nature of the case and what was happening, I consulted the rules, which indicate that if a judge has a prior familiarity with the case and the issues and if it will avoid substantial duplication of proceedings and hearings, it should be reassigned.

And so I simply was following the rules of assignment and transferring of cases.

Senator KYL. Thank you. The second question has to do with a matter of recusal. In July of 2009, you recused yourself from a case alleging racial profiling by the Maricopa County Sheriff's Office. That is the county in which Phoenix, Arizona is located.

Immediately after you denied the defendant's motion to dismiss the case, there were allegations made that your sister's political beliefs might affect your judgment in the matter. You denied those allegations, but you still recused yourself from the case based on the remote possibility that there might be some appearance of bias. I think that is correct. Correct me if I am wrong. Would you say that you declined to serve in that case out of concern for the integrity of the judiciary, as a whole?

Judge MURGUIA. Let me separate that out. Yes, I did ultimately recuse myself from that case. Always, when we review cases of recusal, a core concern is the integrity of the judiciary, and I think I referred to that in my order.

I actually found that there was no actual bias, that I could have been fair; there was no conflict of interest; that I could have presided over their case. My reason for recusal was based on a very narrow basis, and that's whether or not someone could—might reasonably question my impartiality based on the specific and unique circumstances and facts surrounding that case.

That was the only basis. My sister, yes, is a president and CEO of an Hispanic civil rights organization. She has quite a different

role than I do as a Federal judge, and I'm very cognizant of that. I guess I just want to be very clear that her views or opinions do not influence my decisions as a judge. Her views, my sister's, or any close sibling of mine or anyone else, including my own views, do not enter into my decisionmaking.

I had to make a very careful review of the recusal statutes in that case and my code of conduct as a judge, and after careful review and because of the very unique circumstances and details surrounding that case, I entered a recusal.

Senator KYL. Thank you very much.

Senator DURBIN. I have no further questions. I do not know if you do, Senator Kyl.

Senator KYL. Let me just ask one more orally and then maybe just submit two for the record. They are both very brief.

The one that I would just ask you orally here. In your questionnaire, you reported that 100 percent of your practice as an attorney was devoted to criminal law matters, both as state and Federal prosecutor, and that about 68 percent of your cases during your time on the district court bench have been criminal cases.

One attorney, as a result of this, expressed concern that your legal ability is much stronger on the criminal side than the civil. Could you tell us, briefly, how your time on the district court will prepare you to handle appeals in civil matters, if you are confirmed to a seat on the ninth circuit court?

Judge MURGUIA. Certainly, Senator Kyl. I've had a remarkable experience as a district court judge, presiding over a wide variety of civil cases, including tort and contract disputes, cases involving patent infringement, class action cases, and a variety of class action cases, securities fraud, Fair Labor Standards Act, consumer fraud.

I have also been asked to preside over multi-district litigation cases, which, by their nature, are very complex. I think that experience of presiding over those cases gives me a very good understanding of what litigants face, of what trial lawyers at the district court level confront, and what trial judges, the decisions that they have to make and the issues that they have to resolve almost on a daily basis.

And I think that that experience would be extremely beneficial to me as a circuit court judge in the ninth circuit, if I'm fortunate enough to be confirmed.

Senator KYL. Actually, the majority of cases that are considered by all of the judges in the district court are criminal rather than civil; are they not?

Judge MURGUIA. That's correct. We're the number one district of handling criminal cases in the ninth circuit. I think we're the third overall in the country.

Senator KYL. Well, I will submit a couple other questions for the record. I really appreciate your testimony. Welcome, and we look forward to a speedy confirmation of your nomination.

Judge MURGUIA. Well, I thank you and the Chairman for all of your questions and for your help and support. Thank you very much.

Senator DURBIN. Judge Murguia, there may be some written questions sent by Senator Kyl, myself, or other members of the

committee, which I am sure you will be attentive to, which we would appreciate very much.

We thank you very much for your joining us.

Judge MURGUIA. Certainly.

Senator DURBIN. And thank your family, as well, for being part of this hearing.

Judge MURGUIA. Thank you very much.

Senator DURBIN. Thank you.

JACQUELINE NGUYEN
WEDNESDAY, NOVEMBER 2, 2011
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 10:03 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Richard Blumenthal, presiding.

Present: Senators Blumenthal, Feinstein, Franken, and Grassley.
OPENING STATEMENT OF HON. RICHARD BLUMENTHAL, A U.S. SENATOR FROM THE STATE OF CONNECTICUT

Senator BLUMENTHAL. I am going to begin the hearing. We are waiting for some of the other Senators to arrive, but in the meantime I would like to welcome our three nominees and their families. I am pleased to call this hearing to order and thank Chairman Leahy, the Senator from Vermont, for giving me the chance to chair this very, very important hearing.

I am particularly glad to do my part in advancing your nominations. I am impressed by your backgrounds, qualifications, expertise, and experience, and I want to welcome Judge Nguyen as well as Gregg Costa. Judge Nguyen has been nominated to the Ninth Circuit Court of Appeals; Gregg Costa to be District Court Judge for the Southern District of Texas; and David Guaderrama to be the District Court Judge for the Western District of Texas.

I hear consistently when I am in Connecticut, which is my State, about the need for judicial nominations to move forward, and I am glad that we are going to be doing our part today to advance this process, and I am honored to be joined by the Ranking Member of the Judiciary Committee, Senator Grassley of Iowa.

We have a bipartisan interest on this Committee in advancing these nominations because justice should be completely without regard to party or partisan interests. We all have in common the

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very strong national interest in filling judicial vacancies when they occur. We now have about one in ten judgeships open in the country, and I am encouraged and I have been encouraged in the time that I have been in the U.S. Senate, which has only been about 10 months, by the progress that we have made in filling those vacancies. But, of course, we need to do more because 161 million Americans live in districts or circuits that have a judicial vacancy that should be filled.

And I want to say to each of the nominees and your families that nothing is more important in the United States system of government than the jobs you are going to be hopefully filling if you are confirmed. You are going to be the face and voice of justice in this country.

I practiced law for about 30 years in the Federal as well as our State courts in Connecticut, and so I saw firsthand the importance of what you do as a prosecutor, as an Attorney General of the State, and want to commend you and thank you for your willingness to step forward and serve in this very, very important role.

So, again, welcome to you, to your families who are also making a sacrifice, and I would like to ask the Ranking Member, Senator

Grassley, to now make his opening statement.

Senator GRASSLEY. If Senator Cornyn or Senator Feinstein have to leave after their statement, I would be glad to defer to either one of you now.

Senator BLUMENTHAL. Senator Feinstein.

PRESENTATION OF HON. JACQUELINE H. NGUYEN, NOMINEE TO BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT, BY HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. You are very kind. Thank you very much, Senator Grassley. I very much appreciate that. And, Mr. Chairman, thank you very much.

I am very pleased today to introduce Judge Jacqueline Nguyen to become a circuit court judge for the Ninth Circuit Court of Appeals. Judge Nguyen has nearly a decade of experience as a trial court judge with a long record of success.

I recommended that the President nominate Judge Nguyen to the district court in 2009 after my bipartisan judicial selection Committee gave her its highest recommendation. I believed then that she would make an excellent district judge, and she has confirmed that belief, performing her duties as a Federal judge with distinction.

Her nomination is actually a historic one. Judge Nguyen was the first Vietnamese American on the Federal bench when she was confirmed in 2009. She will be the first Asian American female to serve as a Federal appellate judge. I do not doubt that she will make an outstanding addition to the Ninth Circuit.

Born in South Vietnam in the midst of the Vietnam War, Judge Nguyen came to the United States with her family at the age of 10 during the war's final days. The Nguyen family lived in a tent in a San Diego refugee camp for 3 months before moving to Los Angeles. Her parents worked two and three jobs at a time to provide for their family. Judge Nguyen and her five siblings labored alongside their parents after school and on weekends until late at night, helping to clean dental offices, to peel and cut apples, and to help her parents run a small business—a donut shop that her parents saved every penny to open.

As she wrote to my selection committee, and I quote, “Like many refugees, my parents each worked two jobs, and my siblings and I were expected to do what we could to help the family.”

Judge Nguyen's story and that of her family shows that hard work and determination can lead to success, and if I might add, really shows that this country still remains a major land of opportunity. She wrote to my selection Committee that despite the difficulties her family faced, and I quote, “I nevertheless feel incredibly fortunate because those early years gave me invaluable life lessons that have shaped who I am today.” As Judge Nguyen said, she is living the American dream.

Judge Nguyen earned her bachelor's degree from Occidental College in 1987 and her law degree from the University of California Los Angeles School of Law in 1991. Following law school, she practiced commercial law as a litigation associate for the prestigious firm of Musick, Peeler & Garrett for 4 years. Her caseload included complex contract disputes and intellectual property cases.

In 1995, she entered public service, becoming an Assistant U.S. Attorney in the U.S. Attorney's Office in Los Angeles. As a Federal prosecutor, she prosecuted a broad array of crimes—violent crimes, narcotic trafficking, organized crime, gun cases, and all kinds of fraud. She handled all phases of these prosecutions from indictment through trial and ultimately on appeal. She tried ten cases to verdict, and she handled numerous appeals to the Ninth Circuit. She frequently helped prepare other Federal prosecutors in Los Angeles for their appellate arguments as well.

She spent about 5 years in the public corruption and government fraud section of the office, prosecuting complex fraud cases, including one case that was described by the United States Customs Service as its largest commercial smuggling case. She also spent 6 months in the organized crime strike force section, handling a Title II wiretap investigation of a Russian organized crime group responsible for smuggling sex slaves into the United States from the Ukraine.

In 2000, she received a special commendation from FBI Director Louis Freeh for obtaining the first conviction ever in the United States against a defendant for providing material support to a designated terrorist organization. The Justice Department recognized her with three additional awards for superior performance as an Assistant United States Attorney, and in 2000 she was promoted to deputy chief of the general crimes section.

Judge Nguyen is a distinguished jurist with nearly a decade of experience as a trial judge. She left the U.S. Attorney's Office in 2002 when Governor Gray Davis appointed her to the Los Angeles Superior Court. She has served as a Federal district court judge since 2009 when she was nominated by President Obama and confirmed 97-0 by the Senate.

Over the course of her nearly 10-year-long judicial career, she has presided over thousands of cases, including 75 jury trials and 12 bench trials. Forty percent of her cases have been civil proceedings, and 60 percent have been criminal cases. On the bench, she prizes fairness and integrity. She believes in treating all parties with respect and deciding cases in a well-reasoned fashion based on the facts of the case and on the applicable law.

Her colleagues on the bench as well as attorneys from all sides of the bar have praised her for her first-rate legal mind and judicial temperament. In short, she has everything and all the experience to make an excellent addition to the Ninth Circuit. I urge my colleagues to support her nomination.

I thank you for this courtesy, Mr. Chairman. It is very much appreciated. Senator BLUMENTHAL. Thank you, Senator.

And now I would like to turn to Senator Grassley for his statement.
STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR
FROM THE STATE OF IOWA

Senator GRASSLEY. Well, like the Chairman and our colleagues, I welcome the nominees appearing today as well as their proud families and friends.

A nominee's hearing is a very important event for the nominee, their families, and, of course, for this institution, the Senate, and for the public that expects us to be very careful about who gets on the bench with lifetime appointments.

The Committee takes this responsibility seriously. Today's hearing is the 17th nominations hearing held during this Congress, meaning during this year. After today, we will have reviewed the qualifications of 69 judicial nominees throughout this year. That means that after today's hearing nearly 92 percent of President Obama's judicial nominees have had a hearing. In total this year, we have made real progress in 86 of the 99 nominations submitted during this Congress. We have confirmed 53 judicial nominees this year, making this session of Congress one of the most productive over the last 30 years. In total, more than 70 percent of President Obama's judicial nominees have been confirmed through this process, so that is real progress.

Judge Nguyen, nominated to be United States Circuit Judge of the Ninth Circuit, was confirmed by the Senate less than 2 years ago as district judge for the Central District of California. She was nominated for elevation just 41 days ago. Although she has trial court experience, I am less familiar with her appellate experience, so I will be asking questions about some of her decisions there. I also hope to hear from each of the nominees regarding their basic judicial philosophy.

I am going to put the rest of my statement in the record which has the full biography of the nominees, and I welcome them once again.

Thank you, Mr. Chairman.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Senator BLUMENTHAL. Thank you, Senator Grassley.

Today, as we have mentioned, we have three nominees. We are going to consider them in two panels. The first will be Judge Nguyen, who, as you have heard, is currently on the United States District Court for the Central District of California. She has been nominated to be United States Circuit Judge for the Ninth Circuit. Judge Nguyen, if you could please come forward, I am going to ask you to raise your right hand. Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge NGUYEN. I do.

Senator BLUMENTHAL. Welcome, Judge Nguyen, and if you would like to make some opening remarks and introduce your family, please feel free to do so.

STATEMENT OF HON. JACQUELINE H. NGUYEN, NOMINEE TO BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Judge NGUYEN. Thank you. Good morning, Mr. Chairman, Senator Grassley, and Senator Franken. It is nice to see you again. I have no formal opening statement, but I would like to take this opportunity to express my appreciation to all of the members of the Judiciary Committee for considering my nomination to the U.S. Court of Appeals for the Ninth Circuit. I want to thank in particular you, Senator Blumenthal, for chairing today's hearing and Ranking Member Senator Grassley as well and Senator Leahy for scheduling today's hearing. I would like to thank also President Obama for my nomination.

I am joined today by my family, friends, and other supporters, and first, if it is all right with you, Mr. Chairman, I will ask them

to stand as I do the introductions.

Senator BLUMENTHAL. Please go ahead.

Judge NGUYEN. First, my husband, Pio Kim, and my two children, 9-year-old Avery and 12-year-old Nolan; my brother, Charlie Nguyen; and I am especially proud to introduce to you today my parents, Binh and Hoa Nguyen.

I am especially happy to have my parents both be here with me today. My father was 41 years old when he was forced to leave everything behind and begin a new life here in the United States, and without all of the sacrifices that they both have done, I would not be sitting here before you today. So it is very meaningful for me that they are present. It is a very proud day for them.

Also, finally, I would like to acknowledge the presence of my three very talented law clerks who have all chosen to fly here from Los Angeles to support me, and that is Christine Golno, Ellen Landsben, and Steven Feldman, as well as numerous other colleagues and friends and family who are watching the webcast at home.

Thank you very much.

Senator BLUMENTHAL. Thank you, Judge Nguyen, and a special welcome to your family and friends and most especially to your parents who are here today.

I have just a few questions for you. First, we have heard and I have read about your very powerful story, about your background and your achievements and your family's achievements, and I wonder if you could talk briefly about how those experiences would inform or shape your views of your role as a judge on the Ninth Circuit.

Judge NGUYEN. When I was appointed to the State court, mine was a historic appointment because I was the only Vietnamese American appointed to the Los Angeles County, and when you have a position like that, it carries with it tremendous privileges and responsibilities.

So I do take my role as a role model for the community very seriously. But I do not believe that the background of judges changes the law. Regardless of gender or ethnicity, the law remains the same, and my task as a judge is to strictly adhere to the law and apply them to the facts of each case that comes before me. That is what I have done both at the State court level and have done for the past 2 years on the district court, and I will continue to do that as a Ninth Circuit judge if I am fortunate enough to be confirmed.

Senator BLUMENTHAL. Given the feelings that anyone has about litigants who come before him or her as a judge, do you find that difficult to do, that is, to apply the law dispassionately to cases that may have an impact on you emotionally?

Judge NGUYEN. I have always been able to set aside my personal feelings and beliefs and emotions and adhere to the law in every case. I attempt to do that. I think my background occasionally gives me an understanding as to the burdens and challenges that litigants may face as well as victims and witnesses who may appear before me, and I think that is appropriate to do that. But at the end of the day, it is really the law that controls the disposition of every single case.

Senator BLUMENTHAL. How do you view the role of a judge who sometimes encounters counsel who may be inferior or less than

competent or not fully adequate to the case before you?

Judge NGUYEN. Well, certainly in my 9 years on the bench, I have had numerous situations where one side is better resourced or better represented than the other side, and I do not believe a judge's role is to assist one side or the other. I cannot in my capacity as a judge equalize resources, if you will. I attempt to be very clear to the parties early on as to what the court's expectations are in order to make sure that counsel for both sides are prepared, and so if I see an issue with an attorney, then I may schedule extra status conferences and really be very clear about communicating the court's expectation. I have written standing orders, and I also go through them if I believe it is necessary in court during status conferences to make sure that by the time we get to a dispositive motion or a trial that both sides are prepared.

Senator BLUMENTHAL. What has been for you the hardest part or the toughest aspect of being a judge?

Judge NGUYEN. I think that in my 9 years on the bench there are certainly cases that are more challenging than other, particularly, for example, since taking the district court bench, the Central

District of California has a high percentage of intellectual property cases in the area of patent litigation. I do not have an extensive background in that, so it is a challenge to get past the learning curve. But I find that very interesting, and that is part of the reason that I was very attracted and drawn to the district court.

I think sentencings are particularly difficult because it involves somebody's liberty interest, so I am always very careful to thoroughly review all of the relevant information before a sentencing hearing.

Senator BLUMENTHAL. Thank you very much.

Senator Grassley.

Senator GRASSLEY. Thank you very much. Welcome once again.

Judge NGUYEN. Thank you, Senator.

Senator GRASSLEY. I am going to refer to a couple cases, and then I have one question about Sentencing Guidelines.

In a case, I believe you pronounce it, *Guengerich v. Baron*, a prolife group brought suit against Los Angeles City College alleging, among other things, that their First Amendment right to free speech, free exercise of religion, and to assemble peaceably were violated. You held on summary judgment for the college on grounds that the college campus was not a public forum, the ban on outside speech was viewpoint neutral, and the restriction supported the valid purpose of preserving the campus for its intended purpose. I have two or three questions on this case.

Why was this case disposed of on summary judgment rather than letting it go forward on the merits?

Judge NGUYEN. The moving party in that particular case filed a motion for summary judgment, and so when a motion is before me, I look at the standard on summary judgment, and if there are no triable issues of material fact in my view, given the case law at the time, then that is an instance when a motion for summary judgment would be granted.

Senator GRASSLEY. Has this case been appealed?

Judge NGUYEN. You know, Senator Grassley, I am not certain as to what the status of the case is. I do believe that the case is possibly

pending before the Ninth Circuit so I want to be careful not to comment beyond what is reflected in the ruling. And it was a written decision where I attempted to very clearly lay out the court's rationale for review by the appellate court.

Senator GRASSLEY. OK. I have a case that you decided after you had appeared before us as a district court nominee but before you were confirmed by the Senate, so you might wonder why it is coming up now and did not come up then, but we were not aware of it at that time. While you were serving as a Superior Court Judge in 2009, a California appeals court held that you abused your discretion when you departed from the State's three-strikes law. In that case, *People v. Dorsey*, the defendant was arrested after being observed casing a liquor store. When he was arrested, the police discovered a number of robbery-related items in his car, including a ski mask, rubber gloves, handcuffs, and a loaded handgun. The defendant was a parolee who had been convicted of multiple armed robbery offenses in the past. Because it was his third conviction, the defendant would have been subject to a 26-years-to-life prison term. You determined that the conduct was outside the spirit of the three-strikes law and that the 20-years-to-life sentence "does not match the crime" and "the defendant had been crime free for 2 years." Therefore, you struck all but the defendant's prior convictions. Question: Why didn't you apply the three-strikes law and sentence the defendant to a prison term called for by the statute?

Judge NGUYEN. In that particular case, Senator Grassley, the court has the discretion to impose either a two-strikes sentence or three-strikes sentence under California's three-strikes law. There are certain factors that you look to in determining whether it is appropriate to exercise your discretion to strike the strikes in order for the defendant to be eligible for a second-strike sentencing. I had a number of discussions with lawyers from both sides and determined that it was appropriate for me to exercise that discretion. The California court of appeal held that under the particular factual circumstances of that case that it was an abuse of discretion. In my 9 years as a trial judge, that is the only reversal that I suffered, but in retrospect and in reviewing the California court of appeal decision, I do concur that it was error for me to do that.

Senator GRASSLEY. OK. So then my next question dealt with the court of appeals, and you just stated that you did know their decision. Do you recall the basis of their decision?

Judge NGUYEN. The basis of their decision is that it was an abuse of discretion under the factual circumstances of the case. There are many cases filed under the three-strikes law, and during the plea bargaining negotiation process, either the prosecution makes the call as to whether the defendant should be sentenced to a three-strike or a two-strike sentence, and the motion gets filed. It is called a *Romero* motion. And if the motion is filed, then the court has the discretion to make that determination.

Senator GRASSLEY. OK. You just answered my next question, so let me go on. Many jurisdictions, including the Federal Government, have enacted three-strike laws as a mechanism to remove violent criminals from the streets. Do you have any concern about the constitutionality of three-strike laws?

Judge NGUYEN. The three-strikes law has been enforced and

upheld, and as a trial judge, I have imposed many, many sentences under the three-strikes law, including the 25-to-life sentence. Those cases come up with a fair degree of frequency if you sit in a heavy felony calendar, and I frequently applied that case law. That was the one instance where the court of appeal determined that it was abuse of discretion to do that. But I work with that law all the time and have imposed numerous sentences under that particular sentencing scheme.

Senator GRASSLEY. So I think it is fair for me to conclude, which was my next question, but it is fair for me to conclude that you do not have any personal reservations or views that would prevent you from enforcing three-strike laws.

Judge NGUYEN. I do not, Senator. The sentencing schemes are legislated determinations, and whatever the law is, I am comfortable applying that law.

Senator GRASSLEY. Senator, I have got three more questions. Do you care if I go on? And then I will not have to have a second round.

Senator BLUMENTHAL. That is fine.

Senator GRASSLEY. OK. A second issue in *People v. Dorsey* was the State's challenge that you engaged in improper plea negotiations with the defendant to discuss the possibility of dismissing the defendant's prior convictions if the prosecutor added an additional charge and the defendant pleaded guilty. The prosecutor did not add the charge, but over the objections of the prosecution, you dismissed all but one of the defendant's prior convictions anyway. The appellate court did not rule on this issue because it reversed you on other grounds. Nonetheless, the court said that it was "troubled" by the extent of the trial court's involvement in the plea bargaining process. This concerns me. The record seems to suggest that you were trying your best to find a way not to apply the statute, and at the end of the day you did not apply the statute.

Is that accurate? Were you trying to find a way around the three-strikes law? Do you think it was appropriate to engage in the plea negotiation process as you did?

Judge NGUYEN. No, Senator Grassley, it was not accurate. I was not trying to find my way around the application of that particular statute. If I may put it in context, unlike Federal court with the prohibition of Rule 11, in State court it is very common for judges to sit in chambers with the parties in order to discuss disposition of cases. And my practice was to do so if the parties requested such a chambers meeting. And part of the reason for that is because the volume of the cases in State court is so incredibly heavy that that is the most efficient way to resolve matters is to have that informal discussion.

I did so at the request of the parties in this case and held an in-chambers conference with them, and during those discussions, the parties each expressed their view as to what the appropriate sentence in this case may be. And when I take the bench again, I perhaps inarticulately attempted to reflect those discussions in chambers. Now, I do not discuss one case at a time because of the crushing caseload. I sit in chambers, and we may talk about five, six, seven cases at a time at the request of the parties. So when I take the bench, and there is all these people waiting, then I attempt to

in a very brief and succinct way reflect what it was that we talked about.

One of the things discussed in chambers in the Dorsey case was whether there could be an amendment to the indictment such that the second-strike sentence would be enhanced, so something in between the second- and the third-strike sentence, and there were no charges that would be fairly reflective of the facts, and that is what I was attempting to do on the record.

Senator GRASSLEY. OK. Under the Supreme Court's decision, *U.S. v. Booker*, the Federal Sentencing Guidelines are now advisory rather than mandatory. In light of *Booker*, what do you see as the role of the guidelines in making sentencing determinations?

Judge NGUYEN. As a former Federal prosecutor at a time when the Sentencing Guidelines were mandatory—this is the pre-*Booker* era—I am very comfortable with the guidelines. I do believe in the value of uniformity in sentencing. I do not think that defendants should be sentenced differently just because they happen to walk down the hallway and be in front of a different judge. In my 2 years as a district court judge, I start with the Sentencing Guidelines, and in the vast majority of cases, I end with the Sentencing Guidelines.

Now that *Booker* is in effect, obviously judges are directed to also look to factors that are set out by statute, 18 United States Code Section 3553, and if appropriate under the guidelines as well as looking at these factors, then judges may vary from the guidelines. But that is the exception and not the rule.

Senator GRASSLEY. OK. My last question deals with basic judicial philosophy, and I am going to refer to Justice Scalia's speech that he gave 5 or 6 years ago: "I think it is up to the judge to say what the Constitution provided, even if what it provided is not the best answer, even if you think it should be amended. If that is what it says, that is what it says."

So two questions. Do you agree with Justice Scalia? Second, do you believe a judge should consider his or her own values or policy preferences in determining what the law means? And if so, in the latter case, under what circumstances?

Judge NGUYEN. If I could answer your second question first, the answer is no, I do not believe that a judge should consider her own personal policy preferences in determining what the law is. My role, if confirmed to the Ninth Circuit, would be to apply the precedent that is within my circuit and precedent that is set forth by the Supreme Court.

As for Justice Scalia's comment, I am not familiar with that speech, and so I am not sure of the context in which that comment was made. But the Constitution provides certain core principles, and judges are called upon to interpret and apply those principles. Judges do not determine what the Constitution says. Those principles are enduring.

Senator GRASSLEY. OK. Thank you.

Thank you, Mr. Chairman. And thank you, Senator Franken.

Senator BLUMENTHAL. Thank you, Senator Grassley, and thank you, Senator Franken. Please proceed.

Senator FRANKEN. Thank you, Mr. Chairman and Mr. Ranking Member.

Judge Nguyen—and that is how you pronounce it, “win” ?

Judge NGUYEN. Yes.

Senator FRANKEN. Is that always how you pronounced the spelling of your last name or are there different pronunciations?

Judge NGUYEN. I have heard various pronunciations over the years, but “win” is the most phonetically correct spelling, and so that is what I have stayed with.

Senator FRANKEN. OK. It is your name, so you are Judge Nguyen. And congratulations, by the way, for your nomination.

Judge NGUYEN. Thank you, Senator.

Senator FRANKEN. You know, I was here for your nomination to the district court, and——

Judge NGUYEN. You chaired that hearing.

Senator FRANKEN. I chaired it? Of course I did. I remember.

[Laughter.]

Senator BLUMENTHAL. He would have chaired this one if we let him.

Senator FRANKEN. I think that might have been the one where at the time the Ranking Member was Senator Sessions and he saw me chairing at that time, and he said, “A meteoric rise.”

Judge NGUYEN. He was very complimentary, if I recall correctly.

Senator FRANKEN. Well, I said, “And well deserved.”

[Laughter.]

Senator FRANKEN. “Right back at you.”

Speaking of Senator Sessions, Senator Sessions would always ask judges or nominees who had talked about the need for diversity in court about what that meant. I was struck with Senator Cornyn talking about David Guaderrama, and he talked about his experience pumping gas. And he said that his breadth of personal experience will help him in that—I think he said “regard.” I wrote “garage,” but I know it could not be that. So I think it was “regard.”

You know, sometimes I am writing, and I do not—and it reminds me of something you said, and I think we talked about it the last time you were here. In a speech you gave before the Vietnamese American Bar Association, you said that a lack of diversity on the bench contributes to mistrust of the justice system in many minority communities. I agree with that. And so I guess it just—and then I think that whenever that was in a nominee’s history of saying something about the importance of diversity, then-Ranking Member Sessions would always ask, “Well, doesn’t that mean that”—you know, “Isn’t every person who comes before a judge entitled to complete objectivity?” And the answer is always yes, of course. But I just want to maybe get in a little discussion with you about that because—I mean, Senator Cornyn is basically saying that the experience of pumping gas is important. One, you speak to the mistrust of the justice system if it is all—if the court does not reflect the community as a whole. Isn’t that because, two, the quality of justice is different if all the judges have the same kinds of experiences?

Judge NGUYEN. Well, what I meant by that speech is that diversity obviously is very important. The judiciary is a public institution, and judges are public servants. And so if the judiciary does not better reflect the communities in which we serve, the credibility of the judiciary is hurt, and that is an issue that is important

to all public institutions. And so that is what I meant by the value of diversifying not just the judiciary but other public institutions as well.

But as I indicated to Senator Sessions, who was then the Ranking Member the last time I was before this Committee, the law does not change merely by virtue of a judge's gender or ethnicity, background or experiences. Those principles of law remain the same.

Senator FRANKEN. Sure.

Judge NGUYEN. And a judge's role is to interpret that law and then apply it to the facts of each case that may come before the court.

Senator FRANKEN. And I think that is important, and that is the answer that Senator Sessions and all of us are looking for. But I think it is just unrealistic to think that a judge's personal experience does not in some way—I think Oliver Wendell Holmes said

that experience is the law, or something to that extent. And that is going to inform his or her judgment. I mean, it is "judgment."

"Judge" must be the root word of "judgment." Am I correct on that?

Judge NGUYEN. Well, I cannot really speak to other judges' backgrounds or experiences. My background and experience I think has helped my judicial temperament. It gives me an appropriate sense of humility when I review the facts of each case. I have an understanding and appreciation of how intimidating the court system can be, and so I think it does inform my temperament and my sense that judicial restraint is the appropriate way to handle each and every case.

So I cannot divorce myself from my background. I think it does inform my conduct on the bench in that way. But, again, Senator Franken, I do not think it changes the law.

Senator FRANKEN. No, and I do not think anyone who suggests that a judge's experience is important is at the same time saying that that changes the law. But I think that it would be defying common sense to think that a judge's life experience does not inform how he or she judges. And I think that is a good thing to—that is why it is a good thing to have diversity on the bench because, otherwise, you know—I am sorry. Anyway, I think you know what I am saying, and I congratulate you on your nomination.

Judge NGUYEN. Thank you, Senator.

Senator FRANKEN. Thank you, Mr. Chairman.

Senator BLUMENTHAL. Thank you, Senator Franken.

Thank you very much, Judge Nguyen. We appreciate your being here, and good luck to you, and thank you for your service to our Nation.

Judge NGUYEN. Thank you, Mr. Chairman.

KATHLEEN OMALLEY
WEDNESDAY, JULY 28, 2010

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:33 p.m., Room SD-226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Whitehouse, Franken, and Sessions.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. It may look like musical chairs. Senator Whitehouse, who has filled in twice as chair already—this will be the second time today—while we have been doing these things, also had to balance his other assignments.

So I want to begin the hearing, and we will let him take over when he gets here.

Chairman LEAHY. Then because I know that both Senator Brown and Representative Norton have to leave, let me turn to you for the introductions you want to make, and then we can begin the hearings.

PRESENTATION OF KATHLEEN M. OMALLEY, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE FEDERAL CIRCUIT BY HON. SHERROD BROWN, A U.S. SENATOR FROM THE STATE OF OHIO

Senator BROWN. Thank you very much, Mr. Chairman, Senator Sessions, Senator Whitehouse, Senator Franken. Thank you for your attention and your service.

It is my pleasure to introduce Judge Kathleen McDonald O'Malley, a brilliant, dedicated, and trail-blazing jurist. She was raised in Richmond Heights, a Cleveland suburb, supported and nurtured by a typical large Irish Catholic family, many of whom are here today.

Judge O'Malley said that her parents, Thomas and Mildred, whom we call Billie McDonald, in particular, have been the greatest influence in her life.

I want to extend my greetings to Kate's mother, Billie McDonald, who is proudly watching the hearing via Webcast. So, Billie, thank you for joining us.

As a father of three daughters, I know our children's successes are sweeter than our own, and congratulations to her mother.

I would also like to recognize Kate's other family members who are here. Her husband, George Pappas, over my left shoulder; daughter, Nora, and son, Jack, who celebrated his 21st birthday on Monday. Kate's brothers, Kevin and Brian McDonald, are also here, along with numerous cousins and nieces and friends.

Many of Judge O'Malley's current and former clerks have traveled from around the Nation to be here today, she told me seven of them, and that speaks volumes, seven of them are in the audience today.

Today is a little bittersweet. Should this Committee and the Senate concur, the people of Ohio will lose one of our finest judges. But it is a proud day for me to speak about her accomplishments and to share her story with this Committee and with the Nation.

As a child, Kate was blessed with wisdom beyond her years. It was clear what she wanted to do with her life. At the age of 12, she was asked what she wanted to be when she grew up. She replied that she wanted to be a Federal judge.

As she excelled, not—centerfield for the Cleveland Indians for me, Federal judge for her. As she excelled—and she has, obviously, done better than I have, too.

As she excelled in school, high school, college and law school, in her words, “It never occurred to me that I couldn’t.”

She graduated phi beta kappa from Kenyon College in Gambier, Ohio, not far from where I grew up, in 1979. She was first in her class, with one of the Nation’s finest law schools, Case Western Reserve Law School near Cleveland.

After law school, Kate clerked for the Sixth Circuit Court of Appeals, for the very distinguished Judge Nathaniel R. Jones, who was one of her major influences and considers Kate to be like family.

The Cleveland Plain Dealer wrote in 1994 that her clerkship with Judge Jones taught her that as a judge, quote, “You have to be true to the law, you have to be intellectually honest.”

After her clerkship with Judge Jones, Kate spent several years in private practice, she gained invaluable experience representing numerous large corporations, in addition to medium-sized and small businesses.

She became an expert in complex corporate litigation, patent and intellectual property cases, experience that will serve her well as a circuit judge in the Federal circuit.

She translated her private sector experience into a distinguished career in public service as chief counsel and chief of staff for then Ohio Attorney General Lee Fisher. Kate used her brilliant mind and incredible work ethic to litigate major state and Federal constitutional cases at both the trial and appellate levels. Her responsibility that employs intellect and temperament required in the Attorney General’s office has served her well through her career, and people on this Committee are certainly familiar with that.

Recognizing her brilliance, her good legal mind, her superior work ethic, Ohio Senators Howard Metzenbaum and John Glenn recommended Kate’s name to President Clinton for a place on the Federal bench on September 20, 1994.

President Clinton nominated her to serve on the Federal bench as a U.S. District Judge for the Northern District of Ohio. When Judge O’Malley began her service on the northern district bench, she was among the youngest judges serving on the Federal bench. And for the last 15 years, Judge Kate O’Malley, still one of the youngest, has served the northern district of Ohio with distinction. In case there is any doubt as to her experience, she has handled approximately 4,000 civil cases, 800 criminal cases, three major multi-district litigation cases, including one with 20,000 claimants and another with 12,000 separate cases.

And she is an innovator. She has spearheaded national efforts to integrate cutting-edge technologies into courtrooms, ensuring that the administration of justice is equal and fair and open to all who seek it.

As an educator, Judge O’Malley has generously given back to her alma mater, Case Western, to teach the next generation of patent

lawyers and advocates. And as a strong believer in pro bono service, she encourages students and clerks, lawyers and educators alike to provide legal services to those who clearly need them. She will make an outstanding judge in the U.S. Court of Appeals for the Federal Circuit. Her distinguished career pursuing justice based on merits and devoid of ideology or hidden agenda will bring an important new voice to the courtroom.

In closing, what maybe amuses me the most about Kate is when asked what is the one thing that people would not know about her, she replies, “Most people don’t know that I’m a Federal judge,” the way that she carries herself and acts, because to most people, she is a wife, mother, daughter, sister, friend, Lacrosse coach, soccer coach.

She is all those things in the community and all those things as a human being. That is what makes me proud to introduce and to support Judge Kate O’Malley.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much.

And, Judge, you should know that he says these nice things about you when you are not here, too, and has.

[Laughter.]

Senator WHITEHOUSE. [Presiding.] All right. We will now have Judge O’Malley come forward.

[Nominee sworn.]

Thank you. Please be seated. Welcome.

Why don’t I give you a chance to introduce for the record all of your family who are here with you or who may be watching? I gather your mom is watching over the Webcast.

STATEMENT OF KATHLEEN M. OMALLEY, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE FEDERAL CIRCUIT

Judge OMALLEY. Yes, my mom is watching on the Webcast.

First, I would like to thank Chairman Leahy and Ranking Member Sessions for scheduling this hearing. I truly appreciate it. And thank you, Senator Whitehouse, for agreeing to chair it.

I also want to thank President Obama for the faith in me that this nomination shows. I want to thank Senator Brown, who is always charming, and I want to thank him for his kind words. And

I would like to thank Senator Voinovich, who couldn’t be here, but did write to the President on my behalf and has agreed and told me that he is going to submit a statement for the record in support.

Thank you, Senator Franken, for being here.

I won’t introduce all of my family and friends that are here, because we would be here all day, but I will introduce a few, if that’s okay with you.

Senator WHITEHOUSE. Of course.

Judge OMALLEY. First, of course, my husband, who has already been introduced, is George Pappas. My children, Nora and Jack O’Malley. My brother, Kevin McDonald and his wife, Marybeth, and his daughters, Megan and Molly. My brother, Brian McDonald, and his wife, Chris, and his daughter, Claire.

And I also have here two other nieces and nephews, Eleni and George Alafoginis, from the Greek side of the family.

There are lots of friends. I have friends that have come from Ohio for me, I have friends from Massachusetts. I have Judge

Marvin Garvis, who came from Maryland to support me. And I also have seven of my current and former law clerks, who I am thrilled came all the way to be here.

So there are lots of other friends and family that are watching.

I do want to say hello to my mother, and I want to say that my dad and my brother, Tom, were both with me 16 years ago and, unfortunately, have passed away, but they would have loved this.

So thank you, Senator.

[The biographical information follows.]

Senator WHITEHOUSE. Thank you. We are delighted to have you with us. I am conscious, as I chair these hearings, of how significant they are, as we consider some of America's finest individuals, really our best and our brightest, our most committed and dedicated for lifelong positions on the Federal bench.

You have already crossed the first hurdle and are now going from the trial to the appellate level, and we are very proud to have you here.

We are very conscious on this Committee that every day, Federal judges make decisions that affect the lives of everyday Americans; not only the everyday Americans right before them in that case, but others whose lives are affected by the holdings that they deliver.

So it is important to us, and I usually ask of judges to assure me that they will, first, respect the role of Congress as the representative branch of government of the American public policy;

and, second, that they will decide cases based on the law and the facts; third, that they will not prejudge any case, but listen to every part that comes before them; fourth, that they will respect precedent, like it or not; and, finally, that they will limit themselves to the issues that the court is called upon to decide.

I am sure that question will come as no challenge to you, after your 16 years of distinguished service on the district court. But if you do not mind, may I ask you if you agree with those propositions?

Judge O'MALLEY. Those are easy commitments for me to make and I think that my 16 years on the bench and my record has proven that I have adhered to all of them.

Senator WHITEHOUSE. Well, I appreciate that very much, and I am delighted to have you here.

Senator SESSIONS.

Senator SESSIONS. Thank you, Mr. Chairman.

Judge O'Malley, it is a pleasure to see you. You have got a good long history in judicial work. I think it will stand you in good stead.

Let me ask a question or two, because it goes to maybe what I think the role of a judge should be.

There have been some criticisms of Justice Roberts' metaphor that a judge should be a neutral umpire. But I like it. I mean, a judge does not take sides in the game, does not decide who he would like to win before the game starts, and fairly calls the plays as best they can, maybe not perfectly, but do their best in an intellectually honest way, and that is the closest we can get to justice, I think.

I think.

I do believe that there is objective truth and our entire justice system, we have been taught since our earliest days, is to find the truth and then render opinions based on that.

You, in an interview discussing your appointment to the bench in 1994 and the impact Judge Nathaniel Jones, for whom you clerked, had on you, you stated this, “You have to be true to the law, you have to be intellectually honest,” A-double-plus, triple-plus, for that.

And you went on to say, “You can’t say I want a certain result and set out to achieve that result, regardless of where the law really takes you. Jones’ attempt to strike a balance between those two

ultimate goals is something that stayed with me throughout my career.”

But what two goals were you talking about, the striking a balance between two goals? Do you recall that? If you do not, do not let me bother you with it.

[Laughter.]

Judge OMALLEY. I think what was said about Judge Jones the first time that I spoke about that is that Judge Jones said that judges can play an important role in the world and in society. For instance, it’s because of judicial rulings that everyone has a right to counsel ultimately, and that conclusion has been reached. But he said judges should never seek to play a role in society that goes beyond applying the facts to the law that is before them.

So what he was saying is that you can play a very important role, but only within the bounds of what the framers intended for that branch of government.

Senator SESSIONS. I think that is a fair answer. I am not sure exactly how you balance that, but there is—I call it the Siren’s Song of Activism. Some judges seem to get a little bored on the bench and like to make a little history.

I think it is a temptation you should normally reject, although sometimes you are thrust into a situation where you have to make a decision not fully understanding.

You have two death penalty cases that you have been reversed on; one where the defendant failed to object to a jury instruction because the defendant’s lawyer said, “Well, I didn’t object because I thought it would be futile,” and you overturned the death penalty part of it, not the conviction, as I understand it.

But the Supreme Court has rejected this futility standard. It said you cannot not object and then later complain and come before the court and say, “Well, I didn’t think you would rule with me, anyway, Judge,” and still preserve error.

How do you evaluate the way you handle that in life?

Judge OMALLEY. At the time that was decided, which was very early in my career, so almost 15 years ago, the Supreme court had not been as clear at that point with respect to that issue. And in my original opinion, I actually stated at some length that the issue of exhaustion and the issue as to whether or not procedural default would apply was a very close call.

Ultimately, the sixth circuit disagreed with me on that narrow question. Out of a 180-page opinion, that is the only thing they disagreed with.

But even at the time, I acknowledged that it was a close issue and that the law was not fully developed as it would apply to those particular facts.

Senator SESSIONS. And the sixth circuit affirmed you in the *Esparza v. Mitchell* case. However, they were reversed by the Supreme

Court, an occasion on which you, again, upheld an objection to a death penalty case.

Would you want to comment on that briefly?

Judge OMALLEY. Again, the sixth circuit did affirm me in a unanimous opinion with respect to the Esparza case. There were a number of issues in that case particularly having to do with the fact that the jury was never told about frontal lobe damage to the defendant.

I think, actually, given the development of case law out of the Supreme Court since then, if the Court were to get the Esparza decision today, it might actually reach a different result.

Senator SESSIONS. Let me ask you to just make an affirmation, if you will, that you will—that you are prepared to give the government, the state prosecutors and the Federal prosecutors a fair shake and follow the law with regard to death penalty cases and that you have no personal feelings about the death penalty that would impair your ability to objectively and fairly adjudicate those cases.

Judge OMALLEY. Absolutely, Senator. If you look at my record, you will see that I have affirmed more death penalties than I have set aside throughout the course of my career.

Senator SESSIONS. Well, I appreciate that and I think those cases both were close cases and good people could disagree on them.

I would just say you have got the kind of experience that would appear to warrant elevation to the court of appeals and I look forward to—at this point, I am not aware of anything that would cause me to have serious concern about your nomination.

Judge OMALLEY. Thank you, Senator.

Senator SESSIONS. Mr. Chairman I am—well, I have a few more minutes before I will have to leave.

Senator WHITEHOUSE. Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

Judge O'Malley, Senator Brown gave a great introduction to you and I congratulate you and the minions behind you.

[Laughter.]

Senator FRANKEN. You are Irish Catholic. Is that right?

Judge OMALLEY. How did you guess?

Senator FRANKEN. My wife is Irish Catholic. Also, you are named O'Malley.

[Laughter.]

If you are confirmed, you will start to consistently hear a lot of intellectual property cases and in those cases, you are very often going to have to weigh the public's interest in then the free flow of information against proprietary interests or protecting investments.

This is coming up a lot in the net neutrality debate, where a lot of us in the government want to ensure a free and open Internet, and where we also want to guard against piracy.

Can you tell me how you are going to go about weighing those interests?

Judge OMALLEY. Well, Senator, thank you. Those interests or, actually, the balance with respect to those interests are actually spelled out in the statutes that we would need to apply.

So the Patent Act, the trademark laws, the laws that I would

have to apply actually contain the very balances that you are talking about.

They were Congressional decisions and my job is to apply that balance as Congress has dictated it.

Senator FRANKEN. Well, I am glad to hear you say that, as if I was doubting that you would do that. But we were talking here about activism and judicial modesty, and I do have a concern myself about—what did you call it—the Silent Song of Activism, I think the Ranking Member called it.

Senator SESSIONS. Siren's Song.

Senator FRANKEN. Oh, the Siren's Song. Oh, I see. Much better than Silent Song.

Senator SESSIONS. Some songs are better silent.

Senator FRANKEN. Well, anyway, that was my real question, which is, is it Silent or Siren's Song and the Ranking Member answered it.

But thank you and congratulations again.

Judge OMALLEY. Thank you, Senator.

Senator WHITEHOUSE. Thank you very much, Judge O'Malley.

We are pleased that you are here. It is always a pleasure and an honor when the Ranking Member is here for these and his assurances that he sees nothing to inhibit your going forward is always pleasant news and the fact that there is not a whole wall of people on that side with questions is also usually a pleasant sight.

So I will excuse you and we look forward to the Committee taking up your nomination in short order. And then I am going to assume it will be taken to the floor, where, along with a great number of other judges who cleared the Committee unanimously or with microscopic dissenting votes, we will descend into political quicksand for a while.

Regrettably, that is the current situation. I hope that we can clear judges through, but I must say that there are judges who have cleared the Committee unanimously who have sat for months and months and months and months on the Senate floor awaiting a vote.

Judge OMALLEY. I have ultimate faith that won't happen.

Senator WHITEHOUSE. It is always good to have faith, Judge O'Malley.

Judge OMALLEY. Thank you very much, Senator, and my whole family thanks you, as well.

Senator WHITEHOUSE. Congratulations to you and to your family. We are proud to have you with us.

JIMMIE REYNA
WEDNESDAY, FEBRUARY 16, 2011
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 3:02 p.m., Dirksen Senate Office Building, Room SD-226, Hon. Richard Blumenthal presiding.

Present: Senators Feinstein, Klobuchar, Grassley, and Cornyn.
OPENING STATEMENT OF HON. RICHARD BLUMENTHAL, A U.S. SENATOR FROM THE STATE OF CONNECTICUT

Senator BLUMENTHAL. I am pleased to call to order this hearing of the Committee on the Judiciary and to welcome all of you here this afternoon for a very significant proceeding on a number of judicial nominees. I want to welcome the nominees and their families, and say to you that we are appreciative that you're here to support members of your families or friends in this very important moment.

I'm also grateful to Chairman Leahy for giving me the honor of chairing this meeting, and to my colleagues for being here in support of the nominees from their home States.

I just want to say, by way of brief opening statement, that I am always struck when I return to Connecticut, my home State, but how strongly people feel that they want justice done, they want the bench of the Federal courts to reflect the highest quality and instincts and background. I think we have nominees today who are in that tradition. We face many challenges as a Nation. Americans want us to work together. They want us to fill the vacancies that now exist. There are more than 100 of them. That is nearly 1 out of 8 Federal judgeships. Nearly half of these vacancies have been declared judicial emergencies. Over the last 2 years, quite simply, the Senate has failed to keep pace with those vacancies, has not kept pace even with the pace of retirements. We want to make sure that we attract the best and the brightest to our Federal bench.

I am impressed. I have been impressed even in the short time that I've been in the U.S. Senate by the good faith on both sides of the aisle, and I want to welcome Senator Grassley, the Ranking Member, here. I appreciate his being here.

But also, all across the political spectrum from all branches of government, Chief Justice John Roberts to the Attorney General, feeling that we need to begin moving on these nominations. And I believe that we are, and that both parties will be working together to that end. I look forward to working with Senator Grassley, as well as Chairman Leahy and other members on both sides of the aisle, to do my part, that we continue moving in the right direction, increase the pace of nominations and confirmations so that we can fulfill the hopes of the American people, that we act to make sure that justice is done in this great country.

So I would again like to welcome the five nominees. We have with us today Jimmie Reyna, who has been nominated to be a judge on the Federal Circuit Court of Appeals. Mr. Reyna is a partner in Williams Mullin, and is an expert in international trade. He will be introduced by Senator Cornyn, and Senator Cardin, if he is

here.

I would like to yield, now, to Senator Grassley for his opening remarks.

STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR
FROM THE STATE OF IOWA

Senator GRASSLEY. Thank you, Mr. Chairman.

I join the Chairman in welcoming the nominees who are here today, and of course with their families and friends. Everybody is proud of these nominations for their respective family members. This week we confirmed two more nominees to vacancies in the Federal judiciary. Both of these were what we call judicial emergencies. We have now confirmed five nominees during this new Congress. We have taken positive action in one way or another on nearly half of the 50 judicial nominees submitted during this Congress. So we're moving forward, as I indicated I would do on consensus nominees.

On today's agenda are four District Court nominations and the U.S. Circuit Judge for the Federal Circuit. Mr. Chairman, I will not take time here to repeat the full biographical information on our nominees. I was going to take a minute or two on each of the nominees, but since what you have already said about them and their professional background and what they're being appointed to, I'm going to just put that part of my remarks in the record.

But I would like to comment, because of the special nature of the Federal Circuit, not about Mr. Reyna, but about the circuit. Of course, everybody knows that the nominee has significant experience in international trade issues. One of the major concerns of the circuit, the Federal Circuit is unique among the courts of appeal. It is not geographically based, but has nationwide subject matter jurisdiction in designated areas. In addition to international trade, the court hears cases on patents, trademarks, government contracts, certain money claims against the U.S. Government, veterans' benefits, and public safety officers' benefit claims.

Of particular interest to me, because over the last 22 years I have been very involved in whistle-blower protection legislation, is the U.S. Court of Appeals for the Federal Circuit having exclusive jurisdiction over cases related to Federal personnel matters. That includes exclusive jurisdiction over appeals from the Merit System Protection Board, which in turn hears whistle-blower cases under the Whistleblower Protection Act, and eventually some of those—or many, many, many of them—are appealed to this specialized court.

So I thank you, Mr. Chairman, for your courtesies. Again, I welcome and congratulate the nominees.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Senator BLUMENTHAL. Thank you, Senator.

Senator Cornyn and Senator Cardin, to introduce Jimmie Reyna, please.

PRESENTATION JIMMIE V. REYNA, NOMINEE TO BE U.S. CIRCUIT COURT FOR THE FEDERAL CIRCUIT PRESENT BY HON.

JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Thank you, Mr. Chairman, for the opportunity to introduce Jimmie Reyna to the Committee, someone who I've come to know, admire and respect, and had the privilege of, along

with Senator Cardin, recommending to the President that he nominate him for a seat on the U.S. Court of Appeals for the Federal Circuit.

Based on his personal and professional background, I think he possesses the commitment, the skill, and the temperament necessary to apply the law faithfully. Mr. Reyna—his personal history exemplifies the American ideal of opportunity through service and hard work. He was born to Baptist missionaries in New Mexico. He battled adversity to graduate as valedictorian from his high school class, and earn a scholarship to college at the University of Rochester. After graduating from law school at the University of New Mexico, he came to the Nation’s capital with, in his words, “no job and a lot of hope”. Well, since then, Mr. Reyna has repeatedly put that hope into action and it’s paid off.

Perhaps the strongest testament to Mr. Reyna’s abilities comes from the trust that others have placed in him. Throughout this 32-year legal career, he has consistently been recognized as an exceptional attorney by his peers. He has received a perfect AV rating from Martindale Hubble, and was distinguished as one of the best lawyers in the city of Washington, DC by Super Lawyers magazine. Even more impressive, in 2009 the Mexican government awarded him the Oakley Award in Law, its highest legal honor given to noncitizens. Mr. Reyna’s legal background has also prepared him to serve with distinction on the Federal Circuit. For the past 24 years, he has practiced extensively within the field of international trade, as Senator Grassley noted, rising to the position on the board of directors of the Williams Mullin law firm.

In addition to his private legal practice, he served on the U.S. roster of dispute settlement panelists for trade disputes under the North American Free Trade Agreement, and on the World Trade Organization dispute settlement mechanism.

Mr. Reyna has also established himself as a scholar in the field of international law, authoring books on both NAFTA and GATT. As the former chairs of the American Bar Association’s Section on International Law have noted, Mr. Reyna has “an impeccable reputation within the international law community”.

Because the Federal Circuit hears appeals from the U.S. Court of International Trade, his broad expertise in this area will help the court adjudicate some of the most complex cases on its docket. In a system where judicial resources are so scarce, his presence on the court will undoubtedly advance the interests of justice.

Mr. Reyna’s accolades, however, don’t stop at the courtroom door. He has demonstrated a lifelong commitment to public service. As president of the National Hispanic Bar Association, he launched the first-ever outreach program designed to instill trust and confidence in the American legal system within the immigrant community, and he has worked tirelessly to protect some of our society’s most vulnerable citizens, serving for more than a decade on the board of directors of the Community Services for the Autistic Adults and Children Foundation.

Despite the many demands on his schedule, Mr. Reyna has also found the time in his career to practice extensively pro bono, helping to ensure that the American value of equal justice under law is preserved for all, no matter what their income may be. If the

true measure of a person is what they are willing to do for others in need, then Mr. Reyna has once again exceeded all standards. Mr. Chairman, based on the impeccable credentials and distinguished legal career which I have just outlined here, I would urge my colleagues to join me in supporting the nomination of Jimmie V. Reyna to the Federal Circuit Court. Thank you very much. Senator BLUMENTHAL. Thank you, Senator.

Senator Cardin.

PRESENTATION JIMMIE V. REYNA, NOMINEE TO BE U.S. CIRCUIT COURT FOR THE FEDERAL CIRCUIT PRESENT BY HON. BENJAMIN L. CARDIN, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator CARDIN. Mr. Chairman, thank you very much. I'm pleased to join Senator Cornyn in recommending and introducing Jimmie Reyna to the Judiciary Committee. We are very pleased that he has been willing to put his name forward to serve in this position, and I thank him for his commitment to public service. I want to acknowledge the sacrifice that he and his family will be making, and we very much appreciate that sacrifice.

I am pleased to recommend Jimmie Reyna for a vacancy that now exists in the U.S. Court of Appeals for the Federal Circuit. Mr. Reyna comes to this Committee with 23 years of experience in international trade law. You have heard that from Senator Grassley and from Senator Cornyn.

Mr. Reyna currently is a partner in the Washington, DC office of Williams Mullin. Mr. Reyna directs the firm's trade and custom practice group, as well as the firm's Latin America Task Force, and also served for several years on his firm's board of directors, where he currently serves as vice president.

Mr. Reyna has also authored several articles and two books on international trade issues. His third book on the subject is due to be published this spring.

His experience in trade law would bring important expertise to the Federal Circuit, a unique court with nationwide jurisdiction that deals with many trade law issues and yet currently lacks a trade specialist.

Mr. Reyna was admitted to the New Mexico Bar in 1979, and the District of Columbia Bar in 1994. He received his JD from the University of New Mexico School of Law, and his BA from the University of Rochester. The American Bar Association's Standing Committee on the Federal Judiciary evaluated Mr. Reyna's nomination and rated him unanimously "Well Qualified", the highest possible rating.

Senator Cornyn has talked about Mr. Reyna's personal history, which is very compelling. In his practice, he has often represented clients pro bono, devoting a large portion of his time to providing advice and representing individuals who could not afford legal assistance. To me, that speaks volumes of his commitment to our legal system, to make sure everyone has access to our system. He has carried out that responsibility as a lawyer and leader in the legal community.

A few years later, Mr. Reyna moved with his family to the Washington, DC metro area, where he built his well-regarded career in international trade. Mr. Reyna has continuously proven that he is

an outstanding and civic-minded person. He is a well-known national leader in U.S. Hispanic affairs. He has held various leadership positions in the Hispanic National Bar Association, including the national president, vice president of Regional Affairs, regional president, and chair of the International Law Committee.

Mr. Reyna is also a founder and member of the board of directors of the U.S.-Mexico Law Institute. Through his work, Mr. Reyna has strived to ensure that members of disadvantaged communities are informed about the law, that the legal community is prepared to handle the legal challenges facing the growing Latino community, and that the judiciary remain strongly independent, impartial, and accessible to all.

Mr. Reyna's civil service is not limited to his work in the Hispanic community. He has been recognized by the Court of International Trade for his extensive pro bono work before that court.

He also serves on the board of directors of the Community Services for Autistic Adults and Children Foundation.

Mr. Reyna's nomination will also bring much-needed diversity to the Federal Circuit. Throughout his career, he has shown a strong commitment to diversity and racial equality, not only through his service to the Hispanic community, but also through his service on the ABA's Presidential Commission on Diversity in the Legal Profession, and as chair of the Williams Mullin Diversity Committee.

If Mr. Reyna is confirmed, he will be the first minority to serve on the Federal Circuit in its history. With the nomination of Mr. Reyna, the Senate has another opportunity to further increase diversity on the Federal bench. Because of his various qualifications, he has earned and received support from various organizations and individuals, including seven former chairs of the American Bar Association's Section on International Law who wrote an endorsement letter for Mr. Reyna, affirming that Mr. Reyna has the professional credentials, the experience and skills, the appropriate temperament, and the fair and sound judgment to serve on the Federal Circuit.

Mr. Chairman, I would also like to put into the record a letter from Congressman Chris Van Holland from Maryland in support of Mr. Reyna's confirmation.

Last, but certainly not least, Mr. Reyna is a resident of Silver Spring, Maryland and a constituent of mine.

I would urge the Committee to favorably consider his nomination. I think he will make an excellent addition to the Federal bench.

Senator BLUMENTHAL. Thank you. Without objection, we will take your letter, the letter from Representative Van Holland, and insert it in the record.

[The prepared statement of Representative Van Holland appears as a submission for the record.]

Senator BLUMENTHAL. Thank you for being here, both you and Senator Cornyn.

So if we can proceed, I would like to ask, first, that Jimmie Reyna come forward and we will begin with the hearing.

I am going to ask you to stand and raise your right hand.

[Whereupon, the nominee was duly sworn.]

Senator BLUMENTHAL. If you would like to begin with a statement,

Mr. Reyna, we would be happy to have it.

STATEMENT OF JIMMIE V. REYNA, NOMINATED TO BE U.S.
CIRCUIT JUDGE FOR THE FEDERAL CIRCUIT

Mr. REYNA. Yes. Thank you, Senator. It is a privilege to be here today, especially this being your first chairmanship of this committee. I thank you for the invitation, and I thank Senator Leahy and Ranking Member Grassley for scheduling this hearing and having me here to testify and participate today.

Mr. Chair, if I may, I'd like to introduce the members of my family. Senator BLUMENTHAL. Please do.

Mr. REYNA. I hope I get everybody. I'd first like to introduce my wife, Dolores Ramirez Reyna. She and I, in 2 weeks, are going to celebrate our 39th anniversary. We got married when we were freshmen in college, and we've had two wonderful children. My oldest son Jimmie, is autistic and couldn't be here today with us. He's got commitments in the work that he's doing. My other son, Justin, is here. Justin is an attorney licensed in DC. My sister Paz Martinez, from New Mexico, is here. My brother Julian Reyna, my sister Lillian Chapman. I also have with me some cousins, Margie Martinez, Lita McEachern, and Danny Reyna are here.

There's two individuals who are not here that I'd like to speak on, and that is my sister-in-laws, Felicita Ramirez and Michelle Reyna. Also not here—physically anyway—are my parents and my brother. My parents, as you heard from Senator Cornyn, were Baptist missionaries. My father was a migrant second-generation American born into a migrant family, and they were all migrant workers. My mother was an immigrant from Mexico. They met in a seminary in El Paso. They had five children, four of whom I introduced to you today.

We were raised in a very modest environment, but very rich in love, the arts, religion, philosophy, literature. All of the children are graduates of college. We all played musical instruments at one time or the other, though some were much more accomplished than others, I being the least accomplished.

But they taught us many things. My mother would often tell me—she'd look at me. Even as a child, she'd look at me and say, “congas, congas”, which in Spanish means, “with enthusiasm, with respect, with dignity”. After a while, all she had to do was look at me and nod her head at me, and I knew what she was telling me.

My father, to augment family income, would often take us out to the fields. All the children here picked cotton. We've hoed cotton. We've worked in the onion fields. He taught us that all work is honorable. Throughout high school, after football practice, or debate, or speech, I would go and I always had a job. I'd go do my job after that. Then I'd go home, and my dad and I would go out together and we'd clean offices. We did that the whole time I was in high school, and part of junior high.

So we talk about the American dream: it's the children that live it, it's the parents that dream it. I have no further statement, Mr. Chairman. I'm open for questions.

Senator BLUMENTHAL. Thank you very much. I want to welcome you personally to the Committee and really commend and thank you for that extraordinary personal story, your professional

achievements, which are so impressive, and your willingness to serve—indeed, all the nominees’ willingness to serve—in this very challenging and profoundly significant role as a member of the bench.

Let me begin by asking you whether you would please describe for this Committee how you see as different the role of advocate, which you have been, and the role of judge.

Mr. REYNA. Yes, Senator. Thank you for the question, because it applies directly to me, having been a private practitioner going, if confirmed, to the bench. A lawyer is an advocate and a lawyer gathers evidence, facts, witnesses, information, and prepares all that information to present a singular view. That view is either to attack or defend clients’ interests, to advance, perhaps to give counsel on, say, an investment on an adoption. So an attorney is an advocate and is zealous in that advocacy.

A judge, on the other hand, has no personal point of view as to points of litigation. I believe that a judge, at the courthouse door, checks personal feelings and personal biases, or perhaps an idea that a judge may have about a particular issue that is involved in the litigation or the case. I think that the role of a judge is to be unbiased, to be objective, and to apply the applicable law to the facts and to be just in his or her work.

Senator BLUMENTHAL. Thank you. We’ve heard, and clearly you have had, a very significant experience in international law. I wonder if you could describe for the Committee how that experience would be of benefit to you in the role that you would have.

Mr. REYNA. As we heard from Senator Grassley, and also Senator Cornyn and Senator Cardin, the jurisdiction of the Court of Appeals for the Federal Circuit includes international trade appeals that are taken up from the Court of International Trade in New York, and cases that also come up out of the U.S. International Trade Commission.

In the past 23 years I have specialized in international trade and all aspects of international trade, I think that my work on antidumping cases, countervailing duty cases, Customs cases, investment, all laws and regulations that affect the cross-border movement of goods, services and individuals, I think that that experience will serve me well on the Federal Circuit and will bring valuable experience to the court.

Senator BLUMENTHAL. Thank you.

You know, there has been some reference here about the importance of diversity on the bench. I know that you have worked for diversity, particularly in bringing the Hispanic community into the Bar. I wonder if you could reflect for the Committee what more can, and should, be done to increase the diversity of the Bar, and perhaps even what you might do as a role model, but also in other ways as a member of the bench.

Mr. REYNA. I’ve been involved in diversity issues, I guess, since college and then through law school. Within the past decade or so, I’ve been involved in diversity issues and the judiciary, unbeknownst at that time that I would be sitting here before you today.

I think that diversity on the judiciary is extremely important and I think it’s vital to our judiciary and our system of justice. I think what can be done more, is part of the work that I did, I undertook

as president of the Hispanic National Bar Association and the work that I did within the American Bar Association, and that is to help repair excellent practitioners of all walks of life so that they may be prepared to someday be judges.

Senator BLUMENTHAL. And finally, if you could tell us a little bit about the pro bono work that you've done. There's been some mention of it by Senators Cornyn and Cardin, and Senator Grassley.

I wonder if you could describe in a little bit more detail what you've done by way of pro bono work.

Mr. REYNA. As a solo practitioner in Albuquerque, New Mexico, I found out that there is no end of pro bono clients. If you open your door, a line will form of individuals that need legal help but cannot pay for it. I undertook quite a bit, maybe a little bit more than I could have afforded, but I took on a lot of pro bono work at that time.

Most recently, the Court of International Trade has commended me three different times for taking on pro bono cases that I've been requested by the court to handle, and the representation, for example, 53 women in Pennsylvania who lost their work because of the closing of the factory due to the production being moved abroad under the Trade Adjustment Act and laws of the United States. So I've devoted a lot of time, a lot of my energy and career toward pro bono work.

Senator BLUMENTHAL. Thank you.

I'm going to yield to Senator Grassley.

Senator GRASSLEY. Yes. I'm going to touch on this issue of whistle-blowers that the court has jurisdiction of. I know you might not have a lot of experience in that area, but you're going to be called upon to make some decisions.

As a person that sponsored whistle-blower legislation back to 1989, and I have a great faith in most whistle-blowers helping make government more transparent and accountable, and consequently a source of information sometimes to make sure that government is doing what it's supposed to do.

I noticed that throughout the history of the Federal Circuit being involved in whistle-blower cases, they decided 219 cases involving the Federal Government whistle-blowers and it found in favor of the whistle-blowers in only 3 of those cases. I'm not condemning or making any judgment based on it, except it just seems a little bit far-fetched that whistle-blowers will only win in 3 out of 219 cases.

But anyway, one of the things that I want to ask a question about is a standard that they set in the *LaChance v. White* case in 1999. In that case, the Federal Circuit held that a whistle-blower had to present irrefragable proof—I-R-R-E-F-R-A-G-A-B-L-E—that wrongdoing actually occurred in order to prove the claim.

Senator KLOBUCHAR. They use that term all the time in Iowa. Is that right, Senator Grassley?

[Laughter.]

Senator GRASSLEY. I was about to say the opposite.

[Laughter.]

Senator GRASSLEY. It's a whole new standard that I haven't seen anyplace else. I think I know what they mean.

So to get to some discussion with you, in reviewing your questionnaire it appears that you've had little, if any, experience with

whistle-blower law or any Federal personnel law. Considering that the Federal Circuit has exclusive jurisdiction over these cases, what, if any, experience do you have with the whistle-blower protection law?

Mr. REYNA. Thank you, Senator. I think one of the best-kept secrets in U.S. law, that you've been a champion of whistle-blowers for so long. The whistle-blower laws that we have in place are a direct part of the work that you've done, and I think the country owes you gratitude for that.

That said, if confirmed, as a judge on the Federal Circuit, I would approach every whistle-blower case that would come before me with utmost importance, and I would apply the law, the applicable law, to the facts. I would see to arrive at a just and a very expedient decision. I say "expedient" because we're talking about American workers and we're talking about workers that have given their time and energy and work for the Federal Government. It's important that their matters be resolved quickly.

Now, as to the standard that you just articulated, that is a new word to me, too. In New Mexico, we do not have that word as well.

[Laughter.]

Mr. REYNA. However, I will, as a judge on the Federal Circuit, apply the precedent that exists when reviewing whistle-blower cases, and I will also apply the law that exists within the whistleblower statutes. I can confirm this to you, Senator, that in the cases that I adjudicate, I will seek to provide clarity and guidance for future litigants and for our American workers in the government.

Senator GRASSLEY. OK. In the inaugural issue of the Hispanic National Bar Association Journal of Law and Policies, I quote you: "We often hear that the U.S. Constitution is a living document, and as attorneys we recognize that the law can both lag behind social development and accelerate change."

Do you personally believe the Constitution is a living document, and if so, what does it mean for the Constitution to be a living document?

Senator GRASSLEY. Thank you, Senator. The quote that you read, I wrote as the senior editor of the Hispanic Bar Association Journal of Law and Policy. I'm the senior editor of that and I helped found that journal. I wrote that and I said we often hear—and we do. We hear many people claim that the Constitution is a living document, and we hear many different attributes made and labels placed on the Constitution.

What I was doing in that editorial comment, is I was calling attention and calling to action the purpose of the journal, and that is to serve as a catalyst for an exchange of legal ideas so that lawyers, legal scholars, regulators, and academics could gather together and have a free-flow exchange of ideas. So I was advocating, and I was advocating as an editor when I wrote those words. If confirmed as a judge on the Federal Circuit, I will not be an advocate and I would decide cases in an impartial and objective manner.

As to the term "living", what that means—living Constitution, I believe that the Constitution stands on its own text. I think that the Constitution says what it says, and I believe that, as a result of that, over the 200 years of the history of our country, the Supreme Court has built a case of precedent, and there's been case law that has developed over time. If confirmed, I will—and cases

come before me.

And if those cases involved constitutional issues, the constitutionality of a statute, I will first apply the precedent, then I will apply the text, and then I will apply the law, or perhaps even look at the purpose of the originators of the Constitution. But at all times I will approach every matter involving the constitutionality of any statute with the utmost seriousness and I will confine any opinion I'm involved in to the breadth of the statute and to the breadth of the issues that are before us in a very confined, narrow sense.

Senator GRASSLEY. Thank you, Mr. Chairman.

Senator BLUMENTHAL. Thank you, Senator Grassley.

Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Chairman Blumenthal and Senator Grassley, for holding this hearing. We're glad, by the way, Senator Blumenthal, that you're on this Committee.

Senator BLUMENTHAL. Thank you.

Senator KLOBUCHAR. And I want to thank all of our nominees for being here. You all have such impressive backgrounds. I was fortunate enough to be introduced to Mr. Reyna last year by Peter Reyes, who is an intellectual property lawyer at Cargill in Minnesota. I think you know you have many friends in our State.

Mr. REYNA. Yes.

Senator KLOBUCHAR. So we're glad you're here today.

I just, as someone who came who was in private practice like yourself for quite awhile—I was in it, I think, for 14 years, and you were in it for 30 years. Is that correct, Mr. Reyna?

Mr. REYNA. Yes. I've always been in private practice.

Senator KLOBUCHAR. Could you talk about how you expect that to be a useful experience on the bench, having come from the private sector?

Mr. REYNA. Yes. In fact, Senator—and thank you for the question—my legal career has been very diverse. I've handled a lot of different types of cases. One of my most memorable cases is an adoption, for example, where afterwards when the court approved the adoption, a very simple, basic legal procedure, out in the hallway the family surrounded me and cried. That case gave me an understanding of the power in the law, the power to bind families.

Since then, I've also represented large corporations. I've represented a whole broad range of clients. I think that being a private practitioner appearing before courts gives me a very unique perspective.

I understand what it is private practitioners want, what they seek when they appear before a court. They seek a just and a very speedy resolution. If confirmed, one of the things that I'll work for, Senator Klobuchar, is to ensure that I give respect to all the litigants, give them all an opportunity to be heard, and that I will work to have an expedient resolution.

Senator KLOBUCHAR. Very good. And I know that Senator Blumenthal asked you, and Senator Grassley also mentioned your experience as head of the National Hispanic Bar, which I think you said you were president from 2006 to 2007, and you talked a little bit with Senator Blumenthal about the diversity issues.

But what in that experience, as well as your experience in the

private sector, has led you to think what is the greatest challenge that the Federal courts are facing? I'm going to be taking over the Subcommittee on courts in this Committee with Senator Grassley. I was just curious, just from your perspective as a leader in the National Bar, as well as your work before the courts, what you see as the biggest challenge as we move ahead.

Mr. REYNA. Thank you, Senator. I believe that there are many—or a good number—of very significant challenges facing the judiciary. One of them I will address, since you alluded to it, is diversity. I think that diversification of diversity in the judiciary is extremely important. I started working on this particular issue in conjunction with work I was doing with the Sandra Day O'Connor initiative on a fair and impartial judiciary.

I also believe that the judiciary must arrive at more expedient resolutions. It's taken a long time for the litigants to get a case decided. Litigants—and I say this as a private practitioner—represent clients whose businesses often could be at peril or depend on the outcome of a case. The community, the legal community and society as a whole, depends very much on the guidance that courts give when they render a decision. So those are two factors that I think are important challenges to the judiciary.

Senator KLOBUCHAR. Two challenges we also have in the U.S. Senate, I could add. Not that it's taking too long to do the nominations process. But my last question just would be, you did such a beautiful job of talking about your family and your parents and what they meant to you, and you talked about your mother's advice about showing respect and showing enthusiasm for what you do. But what do you think will be your biggest thing that you remember from the advice from your parents and your background that you'll take to the bench in terms of your own background, and what has that meant to you as a judge?

Mr. REYNA. Again, I grew up in a religious household. The faith that my parents had exists in all the children and everybody behind me. I think with that comes with having respect and dignity to everyone that you deal with. Yesterday, I was walking down the street on 16th Street and the doorman of a building called me over and introduced me to his sister. What he said is, this man, I don't know his name, but he's been walking past this door for the past 20 years and we've been saying hi to each other, and I want you to meet my sister. He introduced us.

The reason that happened is because it's true, I would walk by there and for the past 20 years, I see him standing there and we say hi. He says hi and he's looking at me. I think that springs from my parents, the value that every human being has within them the capacity to give respect to others, but more than that, that we all merit the respect and dignity of each other, whether we do this in government, whether we do this in our family lives, or whether we do this on our own.

Senator KLOBUCHAR. Thank you very much.

Mr. REYNA. Thank you.

Senator BLUMENTHAL. Thank you, Senator Klobuchar.

I believe there are no further questions of Mr. Reyna, so thank you very much for being here today. We're going to move on to the second panel. Again, thank you to you and your family.

Mr. REYNA. Thank you, Mr. Chairman.

Senator BLUMENTHAL. Congratulations on your anniversary.

Mr. REYNA. Thank you very much.

PATTY SHWARTZ
WEDNESDAY, FEBRUARY 15, 2012
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:34 p.m., Room SD-226, Dirksen Senate Office Building, Hon. Chris Coons presiding.

Present: Senators Grassley, Graham, Coburn, and Lee.

OPENING STATEMENT OF HON. CHRIS COONS, A U.S. SENATOR
FROM THE STATE OF DELAWARE

Senator COONS. (Off microphone) U.S. Senate and congratulate them on being before us today, the nominees.

I would also like to welcome those of my colleagues who are here to introduce the nominees. I think the sheer number of my colleagues speaks to the high regard in which the nominees are held.

The judicial roles we will discuss today carry life tenure and, thus, require the highest levels of character, temperament and judgment. And the participation of Senators here today in offering introductions and commendations speaks to the importance of nominations as an important part of the work of this Committee.

As we approach the summer before a Presidential election, the longstanding Thurmond rule, as it is known, may once again prevent the Senate from confirming any more judges this Congress.

Notwithstanding the Thurmond rule, however, the vacancy rate in our Federal judiciary currently stands near 10 percent, a very high rate in the third year of any modern President's administration.

So it is my belief that it is urgent the Committee and the full Senate give today's nominees fair and reasonably expeditious consideration without procedural obstacles.

Due to the large number of home State Senators here to give introductions, I will refrain from offering any longer opening statement.

Senator Grassley, would you like to proceed with a statement at this time?

STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR
FROM THE STATE OF IOWA

Senator GRASSLEY. Today we are continuing our progress on processing President Obama's judicial nominees. Earlier this afternoon, we confirmed the 127th Article 3 judge nominated by our President.

With today's confirmation, we have confirmed over 62 percent of the President's circuit judge nominees. This is the same confirmation percentage for President Bush's circuit nominees at a comparable time in the first term.

Today marks the 21st nomination hearing held in this Committee during this Congress, and we will have heard from 80 judicial nominees. All in all, nearly 85 percent of President Obama's judicial nominees have received a hearing.

Even as we go forward with a hearing today, there remains an underlying concern about the President's abuse of appointment power. I am not going to elaborate on that again, because you heard me speak about it many times. But I want to note that that does affect the operating environment that we are in. It is the President who has put a cloud over the confirmation process.

I welcome the nominees today. And I will put the balance of my statement in the record.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Senator COONS. Thank you, Senator Grassley.

I know my colleagues' schedules are tight. So I would encourage you to feel free to leave after you have concluded your introduction.

Following statements and introductions, each of the nominees will be invited to give an opening statement and to recognize their family, friends and supporters when the panels are called.

Next, we welcome Patty Shwartz, who is currently a magistrate judge in the district of New Jersey. She has been nominated to be a Circuit Judge for the United States Court of Appeals for the Third Circuit.

Senator Lautenberg, please proceed.

PRESENTATION OF PATTY SHWARTZ, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE THIRD CIRCUIT BY HON. FRANK R. LAUTENBERG, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. Thanks, Mr. Chairman and members of the Judiciary Committee, for the opportunity to introduce Judge Patty Shwartz to the Committee.

Although I came from a business career before the Senate, I have always been deeply conscious of the fact that the backbone of our society is respect for the law. In fact, I am proud to have a Federal courthouse in Newark carry my name, and Judge Patty Shwartz, the nominee you will meet today, works in that courthouse.

I requested that an inscription be placed on the wall, a plaque, at the front of that courthouse that says "The true measure of a democracy is its dispensation of justice."

The sentiment behind that quote is one of the reasons that I am pleased to introduce to this Committee Judge Shwartz, President Obama's nominee to the U.S. Court of Appeals for the Third Circuit. Judge Shwartz has been an outstanding magistrate judge, with a solid reputation in the New Jersey legal community for dispensing justice fairly and wisely. She will make an excellent addition to the third circuit court of appeals.

John Lacey, past president of the Association of the New Jersey Federal Bar, said Judge Shwartz is, and I quote him here, "thoughtful, intelligent, and has an extraordinarily high level of common sense."

Thomas Curtin, the Chairman of the Lawyers Advisory Committee for the U.S. District Court of New Jersey, said, and I quote him, "Every lawyer in the world will tell you that she is extraordinarily well qualified, a decent person, and an excellent judge."

Since 2003, she has served as the U.S. magistrate judge in the district of New Jersey, where she has handled more than 4,000 civil and criminal cases. Before joining the bench, Judge Shwartz spent almost 14 years as an assistant U.S. attorney for the district of New Jersey. In this role, she supervised hundreds of criminal cases, including cases involving civil rights, violent crimes, drug trafficking, and fraud.

Judge Shwartz graduated from Rutgers with highest honors. She received her law degree from the University of Pennsylvania Law

School, where she was an editor of the law review and was named her class' outstanding woman law graduate.

Judge Schwartz's roots in New Jersey run deep. Like me, she is a native of the city of Patterson, where she learned the value of hard work from her parents, who owned and operated a store there for more than 50 years.

Judge Schwartz inherited her parents' strong work ethic, and that is another reason why I believe she is so well qualified to serve on the U.S. Court of Appeals.

When President Obama announced her nomination, he said, I am going to quote, "Judge Schwartz has a long and impressive record of service and a history of handing down fair and judicious decisions. She will be a thoughtful and distinguished addition to the third circuit court."

Like President Obama, I believe Judge Shwartz is well qualified to serve on this court, and I am confident that this Committee will agree.

Thank you, Mr. Chairman.

Senator COONS. Thank you, Senator Lautenberg.

Senator Menendez.

PRESENTATION OF PATTY SHWARTZ, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE THIRD CIRCUIT BY HON. ROBERT MENENDEZ, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator MENENDEZ. Well, thank you, Mr. Chairman. And let me say how thrilled I am to see your quick ascension to chairing the hearing. So my congratulations to you.

To my dear friend, the Ranking Member, we sit on the Finance Committee, always good to be with you.

And to all the distinguished members of the Committee, I am here today to express my unqualified support for Judge Patty Shwartz for the third circuit court of appeals.

As the nominee's home State Senator, I take my advise and consent role for judicial nominations extremely seriously. These are lifetime appointments to the Federal bench and should not be taken lightly. And when it comes to the circuit court, the last stop before the United States Supreme Court, that responsibility takes on even more weight.

Because of that, I undertake an in-depth and thorough review not only of a nominee's past record, but also of their understanding of the law, their intellect, their analytical thinking and reasoning.

I have had the opportunity on more than one occasion to pursue with Judge Shwartz the important issues that I believe reflect the high standards to which a nominee for the circuit court should be held. And having that full breadth of understanding and the fact that I am here supporting her speaks volumes to the nominee's character and, I believe, suitability for the position.

Aristotle said "Character may be called the most effective means of persuasion," and I can say that in my meetings with Judge Shwartz, I have learned that she is clearly a person of character.

In short, Mr. Chairman, I have been persuaded to be supportive of Judge Shwartz, and I join with Senator Lautenburg in introducing Judge Shwartz to the Committee, urge the Committee to send her name to the full Senate with a unanimous recommendation to be confirmed to the third circuit court of appeals.

I will not replicate all of the judge's achievements, which my distinguished colleague has listed, but certainly they are worthy of the Committee's consideration.

I would also like to mention in closing that during this process, I had the benefit of invaluable advice and counsel from many members of the Federal bar who spoke very highly of Judge Shwartz, and I would like to specifically mention three of them, among others, but three of them who were very helpful—Gerry Krovatin, James Cecchi, and John Vazquez, who came forward to affirm what I subsequently discovered for myself in discussions with Judge Shwartz—that she possesses the intellect, the character, and the integrity to be confirmed to the third circuit court of appeals. And I look forward, Mr. Chairman, to the swift and favorable consideration of Judge Shwartz. And notwithstanding some of the comments both you and the Ranking Member have made, I hope that the administration of justice ultimately needs judges to ultimately effectuate that process.

So I look forward to—that environment is not a reason not to move qualified judges forward, and I think this Committee has taken that seriously on both sides of the aisle and I am looking forward for this opportunity for it to become a reality on the floor, as well, after the Committee's recommendation.

Senator COONS. Thank you, Senator Menendez. Thank you, Senator Lautenberg.

Now, I would like to ask Judge Shwartz to come forward and Please remain standing.

[Nominee sworn.]

Senator COONS. Thank you. Let the record reflect the nominee Has been sworn and has answered in the affirmative.

Judge Shwartz, I welcome you and encourage you to acknowledge Your family members and friends you have with you here today, And then to offer a statement.

STATEMENT OF JUDGE PATTY SHWARTZ, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE THIRD CIRCUIT

Judge SHWARTZ. Thank you, Senator.

First, I don't have an opening statement, but I would like to take the opportunity to say some thank yous and to give some acknowledgments.

First, please let me extend my thanks for your having this hearing today and for the Committee to consider my nomination.

Of course, I'd like to thank the President for the honor of the nomination.

I would like to thank my two home State Senators from New Jersey for their support and their kind words today.

I'd also like to thank the members of the Department of Justice and the White House Counsel's Office who have led me through this and guided me through this process. I'm grateful.

I'd like to also thank and acknowledge three categories of families I have. Without belaboring you with the names of all of them, I have a family of friends that I've had since I was a child, through high school, college, law school, into my professional life, who have been tremendously supportive. Some are present. Some are present by Web, but all are incredibly important to me.

In addition, I have been the member of a second family which we call in New Jersey the Federal family. It's a family of lawyers,

agents, agencies, practitioners who all appear before the Federal court.

I became a member of that family when I became a law clerk to the honorable Harold Ackerman, who we have lost, but I remember with fondness today and with great appreciation. And honoring his memory and me are some of the law clerks he had during his more than 50 years as a judge. So I didn't clerk with all the people who are here, but they honor me with their presence.

In addition to that, I have a chambers family. I have a family of law clerks I've worked with in the past, both my own and others. And then there's, of course, the very generous Federal bar that I have been a member and participate in both as a practitioner and as a member of the court, and I give great thanks to all of them, as well as members of the court family that I'm a member of.

Finally, I would like to take a moment just to introduce you to and acknowledge members of my family. I have cousins who are watching, hopefully, by Web from New Jersey to California, and perhaps one even in Israel.

I have with me today members of my immediate family and I would like to be able to at least mention them by name and mention others who are watching by the Web.

With me today I have my brother, Richard; my sister, Nancy; my brother, Jeff; and, my nephew and Godson, Max. Max's brother is watching from the University of Arizona by Web, and they are the son of our late sister, Betty, and she would be incredibly proud of both of them.

Also watching by the Web are my brother Jeff's two greatest accomplishments, my two nieces. They're in elementary school and they're watching with their mom, Linda, also by Web.

My sister's fiancé, John, is watching by Web. Max and Jake's dad is watching by Web, Mitchell Smith.

Notably absent today are my parents, Jean and Harold Shwartz. We've lost them, but I obviously am here because of them, both from a biological standpoint, of course, but also because of all the great support, and they've always given my life adventure.

And, finally, with us today is someone who has been associated with my family for such a long time, he's practically a member of the family, Jim Nobile. And I have others who are here in the audience and I know they'll forgive me if I don't mention them by name.

Thank you for allowing me to do that, and I will look forward to answering your questions.

Senator COONS. Absolutely. Thank you, Judge Shwartz, and thank you for participating in the nominating process and for volunteering to continue to serve after your long service with the U.S. attorney's office.

Now, let me start, if I might, an initial round of 5-minute questions. My first question, Judge Shwartz, if you would, please, just briefly describe your judicial philosophy.

Judge SHWARTZ. My judicial philosophy is to decide only the case in front of me based upon the law and the facts established in the record before the court; to give the opportunity to the parties to be heard; to consider those impartially; and, to render fair and prompt decisions and give reasons for those decisions both for the benefit

of the litigants, the public, and, in the event there's a review by a reviewing court, the reviewing court.

Senator COONS. How would the skills you've developed as a magistrate judge translate to your responsibilities as a judge on the third circuit? And if you feel compelled to add, and the experience you had as clerk in the district court, feel free to do so.

Judge SHWARTZ. Thank you. And I understand you clerked, as well, so you know how important that experience is.

Senator COONS. For the third circuit, yes.

Judge SHWARTZ. That's right. It's a formative experience for all. I'm of good fortune of having a collection of experiences. I was an assistant U.S. attorney for 13 years. I clerked for a Federal district judge for a little more than 2 years, and I've been a magistrate judge for what will be 9 years on March 10.

As an assistant U.S. attorney, of course, I became exposed to a variety of areas of criminal law and the legal process that is involved in the criminal area.

As a magistrate judge, I work in a district where the district judges give the authority to the magistrate judges to the broadest extent possible based upon the Constitution and the Federal Magistrate Judges Act and, as a result, I've had the opportunity to handle civil cases, pretty much the entire pretrial process, with the exception of dispositive motions and trial, unless the parties have consented to my jurisdiction.

And I've had the good fortune of having parties consent to my jurisdiction in civil cases more than 70 times, where I've been able to take the cases through judgment. I've tried 14 cases as a magistrate judge and more than 15 as an assistant U.S. attorney.

And all of those collective experiences have sensitized me to many things, including, obviously, legal research and writing, understanding the development of a record and where to perhaps find something in a record, if I'm fortunate enough to be confirmed for this other position.

I have an understanding of how a record is developed and where to find things. Of course, I'm accustomed to legal research and writing, which is a large part of that position, should I be lucky enough to be confirmed.

So those are just some of the experiences that I have that I hope that would enable me to serve in this other position.

Senator COONS. Some 25 years ago——

Judge SHWARTZ. Yes.

Senator COONS [continuing]. At your law school graduation, you stated, in part, in a much longer address, that lawyers should take a, "active position in the development of the law."

Do you still feel that way today? And tell me how you would respond to those who might be concerned that you would take an active role or how you understand that concept today, should you be confirmed as a judge on the third circuit?

Judge SHWARTZ. Thank you for asking. The remarks I think you're referencing are remarks I made 25 years ago when I was about ready to receive my law school diploma, and I was giving remarks to my classmates who were very talented, blessed group who had a terrific legal education. And so I was speaking to future advocates, not to—not as a judge nor did I think I was speaking to

a group of judges.

And I was trying to encourage them to use all their good skills to school themselves on the law and to advocate for their clients, but certainly I wasn't speaking at that time as a judge.

Senator COONS. You are also going to face an interesting situation.

As a magistrate judge, a large portion of your work consists of developing recommendations and reports for the review and potential action by district court judges. That's some portion of your work.

The district court is also responsible for decisions about whether to appoint and reappoint magistrates to the bench.

As a circuit judge, you will be called to review and, where appropriate, reverse rulings of those very same judges. How would you guard against being unduly deferential or having your decisions in any way complicated by judges who have supervised you in your current role?

Judge SHWARTZ. I would apply the same approach that I've taken in the job that I have now. I have people who appear in front of me who I've known from walks of life other than the one that I currently lead, and I'm duty-bound to apply the law that's governing to the issue, to the facts that have been established, and reach what I think is an appropriate decision.

Senator COONS. Thank you very much, Judge Shwartz.

Judge SHWARTZ. Thank you.

Senator COONS. Senator Grassley.

Senator GRASSLEY. According to press reports, Senator Menendez initially declined to support your nomination. These accounts centered on the Citizen United case. The second interview with him also appeared to focus on this, and I would read that quote. "In my opinion, Judge Shwartz did not adequately demonstrate the breadth of knowledge of constitutional law and pivotal Supreme Court decisions, such as Citizen United, that we should expect from a United States circuit court judge."

First question. What did you discuss in these interviews?

Judge SHWARTZ. What I can tell you, during our two interviews, is at no time did the Senator ask nor did I say how I would rule on any case. You heard his remarks, how we did meet twice, and during the course of our collective sessions, we talked generally about my understanding of certain substantive areas of the law. But, again, at no time did he ask me what my opinion was or what my views were of any of those cases.

Senator GRASSLEY. Well, then, I am going to read a second quote from him. "Judge Shwartz satisfactorily answered questions covering important legal topics, such as current law on rights of corporation under the First Amendment, constitutional limits on executive branch power, and the application of heightened standards of review under the Constitution. She adequately allayed my earlier concerns."

So what changed between the first and second interview?

Judge SHWARTZ. I don't know that I'm in a position to say what the Senator felt about that.

Senator GRASSLEY. Well, you could at least tell us what maybe you said that changed his mind.

Judge SHWARTZ. I can't say what it is that changed his mind.

Senator GRASSLEY. Did you change your answers or give him any assurances on any legal topic or case?

Judge SHWARTZ. I did not give him any assurances nor did he ask. Perhaps we talked in more detail about certain of the subject areas, but——

Senator GRASSLEY. I have further questions along this line. Did you discuss Citizen United during the second meeting with Senator Menendez?

Judge SHWARTZ. We discussed the corporate rights in a general sense, and then I—we talked a little bit about the difference between the Constitution's rights.

Senator GRASSLEY. Did your views on these subjects change after your initial meeting with Senator Menendez?

Judge SHWARTZ. At no time did I express any of my views during either of the sessions with the Senator. We discussed legal principles.

Senator GRASSLEY. Did you discuss any topics at the second meeting that you did not discuss at the first one?

Judge SHWARTZ. I can't remember. I'm sorry.

Senator GRASSLEY. In Citizen United, the Supreme Court reconsidered the ruling of Austin. In a 5–4 decision, the Supreme Court overturned its decision in Austin and held that campaign finance restrictions on corporations at issue in the case were unconstitutional. Many, including the President, have been highly critical of the Supreme Court decision. Do you believe Citizen United was correctly decided?

Judge SHWARTZ. It would be improper for me to have a personal opinion on that subject.

Senator GRASSLEY. Are you sure of that answer? I mean the answer you just gave to me.

Judge SHWARTZ. Am I sure that I—it would be——

Senator GRASSLEY. You mean you do not feel that you could tell me whether or not you think Citizen United was properly decided.

Judge SHWARTZ. What I can tell you, Senator, is because I'm a sitting judge, I'm duty-bound to apply the law to the facts without regard to my personal views concerning whether a decision is properly decided or not.

It's the United States Supreme Court's precedent that I'm duty-bound to follow.

Senator GRASSLEY. The President has characterized the Supreme Court's decision as reversing, "a century of law." Do you believe that this is a fair and accurate characterization of the Supreme Court's decision?

Judge SHWARTZ. I don't know that I could characterize it. That was the President's characterization, as you've quoted it to me. I know what the opinion said and it had reviewed its precedent in reaching its conclusion.

Senator GRASSLEY. Before I ask another question—going back to what the Chairman asked you about your commencement address, what did you mean when you said, quote, "We must not simply be satisfied with precedent, but rather must embellish upon it to satisfy the needs of both individuals and society?" And I'm going to follow-up with another question.

Do you believe it is ever proper for a judge to embellish or manipulate precedent?

Judge SHWARTZ. Answering your latter question first, if you don't mind, of course not. The judge is duty-bound to apply the precedent to the facts before it.

My remarks 25 years ago were to my law school classmates who were future advocates, and maybe my word choice should have been more along the lines of good faith extensions of the law was an appropriate thing for an advocate to take a position about on behalf of a client. So it was a different context than the context I work in today.

Senator GRASSLEY. At that particular time, what did you mean when you said "use our creativity to manipulate the preexisting doctrine to best accommodate the demands of a greater society?" Then I will stop here and let my colleagues ask questions.

Judge SHWARTZ. What I was trying to do to my future classmates was to energize them and let them know what important roles they're going to have in society in whatever way they choose to use their law degrees, and that's all I was trying to do to a group, as I said, of future advocates.

Senator GRASSLEY. I will conclude with this. Just simply, I think you are trying to tell us—and I do not question your veracity—that none of these views you expressed are with you today as far as being a judge.

Judge SHWARTZ. That's correct.

Senator COONS. Thank you.

Senator Lee.

Senator LEE. Thank you, Mr. Chairman.

And thank you, Judge Shwartz, for being with us today. You have had an interesting and distinguished career, and this is an exciting step that you have been nominated to take.

If you are confirmed to this position, let us suppose that you discovered perhaps as you are—I do not know—on the Metroliner going from Newark down to Philadelphia the day before argument, while doing your last review of the bench memos and the briefs in a particular case, you discovered circumstances present in the case that you had not noticed before suggesting that perhaps Article 3 standing was lacking in that case the day before oral argument. How might you proceed in this circumstance, supposing further that the issue of Article 3 standing had not been raised or briefed either before the third circuit or before the district court?

Judge SHWARTZ. Well, of course, Senator, we would know that you have to have standing in order to bring an action. It's one of the core first steps out of the box when you bring a lawsuit. Having not been in the appellate court, I'm not sure of the procedures that one would follow. But applying that scenario—and not that I've had exactly a standing issue, but where I've had an issue with the parties that have come up after I've reviewed and thought we were ready to rule, I've either issued orders to invite them to brief an issue or to raise things orally with me on the narrow point that would be presented that perhaps hadn't been discussed before, and, certainly, an issue of standing would have to be one of those issues or else the court couldn't rule.

Senator LEE. And you would certainly be willing to raise it sua sponte.

Judge SHWARTZ. I think the court is obligated to do that to be

sure that there is standing of the parties and that all the other justiciability doctrines are satisfied.

Senator LEE. Right. So assuming that this does come up again in this scenario or you discover it the day before oral argument, such that there is not time to ask for supplemental briefing prior to argument, how might you proceed at oral argument? What questions might you ask of the advocates?

Judge SHWARTZ. Again, since I've never been in the appellate posture as a judge, I'm sure among the first things I would do is speak to the other panelists to let them know I had found this issue and then confer with them to see the best way to elicit a response on the subject either at oral argument or to give them an opportunity for supplemental briefings.

But, again, I imagine there's some procedural requirements that the internal operating rules of the appellate court or its local rules may guide us in how to handle that situation.

Senator LEE. Sure. But setting aside those procedural rules, those internal operating procedures for a minute, just talk about the substance, what kinds of questions? What kinds of facts would you be looking for?

Judge SHWARTZ. Sure. Well, in terms of the issue of standing, of course, the party has to have a redressable issue that can be addressed by the court in that context; that they had injury, in fact, and that there's redressability. That is, the lawsuit could lead to an address of that alleged injury.

Senator LEE. Do you believe that Congress has powers other than those that are enumerated in the Constitution? Does it have implied powers that are not expressly granted?

Judge SHWARTZ. Well, not my belief, but my understanding of the Constitution is the Tenth Amendment sets forth the enumerated powers, and there are provisions of the Constitution that provide Congress with its authority to act, whether it's the commerce clause, the necessary and proper clause, the taxing and spending authority and the like.

Senator LEE. So outside of that, if you did not have one of those, you would not be inclined to imply a power of Congress.

Judge SHWARTZ. I'd have to look at the precedent to see if there's some interpretation that's been given by the Constitution—of the Constitution—to determine what the authority was for the act.

Senator LEE. In light of the fact that there is sometimes legislation passed by Congress that may come before you from time to time that does not expressly invoke any enumerated power in the Constitution, how might you approach that situation? Would you be willing to invalidate legislation if it did not invoke one or more express authorities granted to Congress?

Judge SHWARTZ. I think if an issue concerning examining a statute came before the court, the analytical process that I would follow is look at the plain meaning of the statute first; if it weren't clear, look at the legislative history, the scheme in which the particular provision falls, and try to glean from that which authority Congress was acting on, assuming that the challenge to that statute was a challenge that Congress was acting outside of its authority as opposed to some other challenge.

Senator LEE. Right. Assuming that the text does not get you

there, how could the legislative history provide the necessary link to an enumerated power under the Constitution?

Judge SHWARTZ. It would depend on what the history said, if there was a history. There could be legislative history that would give an indicator of what authority Congress was relying upon in acting in the way it did.

The other area, of course, is if there's been—finding precedent that's already examined the particular provision at hand.

Senator LEE. Certainly. Certainly. I see my time has expired, Mr. Chairman.

Senator COONS. Thank you, Senator Lee.

Senator Coburn.

Senator COBURN. Thank you, Senator Coons.

Welcome.

Judge SHWARTZ. Thank you.

Senator COBURN. You have done a great job so far.

Judge SHWARTZ. Well, thank you.

Senator COBURN. Can you assure this Committee that at no time in the future, should you be appointed to this position and confirmed, that you will rely on foreign law in any way whatsoever to make a decision that is before you?

Judge SHWARTZ. American law dictates the outcomes of cases in the United States courts, and only if the binding precedent for some reason directed consideration of that, but that would be the only circumstance that I would rely on foreign law, unless there was some precedent that required it or some treaty that required it.

Senator COBURN. Well, I am going to go back and ask it again, because I want a yes or no answer. Can you assure this Committee that at no time, should you be confirmed to this position, that you will rely on anything other than the Constitution, the statutes and the precedents before you to make a decision about the outcome of that case?

Judge SHWARTZ. I can assure you of that.

Senator COBURN. Thank you. When you visited with Senator Menendez about the rights of corporation under the Constitution, what did you say those rights were under the Constitution? What are they? What did you tell him?

Judge SHWARTZ. Based—well, I can tell you what my understanding is.

Senator COBURN. Under the First Amendment. I am just asking the First Amendment.

Judge SHWARTZ. Just under the First Amendment, my understanding from the precedent of the United States Supreme Court is that under the First Amendment, corporations have free exercise to political speech and restrictions on that would be subject to the highest level of scrutiny.

Corporations have other rights under the Constitution, but not every constitutional provision gives a corporation rights. There are differences.

Senator COBURN. So does the Citizen United ruling reflect the same rights under the First Amendment, in your mind?

Judge SHWARTZ. Same rights as to an individual's rights?

Senator COBURN. Yes.

Judge SHWARTZ. The Supreme Court precedent says that at least for political speech, it's not judged based upon the speaker. To judge based upon the speaker the Supreme Court found to be improper.

Senator COBURN. Well, that is the law. That is the law. That is the precedent now, correct?

Judge SHWARTZ. That's my understanding of the precedent, yes.

Senator COBURN. So you are bound to follow those precedents.

Judge SHWARTZ. I am.

Senator COBURN. Thank you. One last question for you. When Senator Menendez asked you about the constitutional limits on the executive branch power, was there a specific branch power he was referring to?

Judge SHWARTZ. I don't recall that during the two conversations. We talked generally just what my understanding was of executive power in a very general way.

Senator COBURN. Thank you. I have no other questions.

Senator COONS. Thank you, Senator Coburn.

I will begin a second round, if I might. Judge Shwartz, if you would, just what are your views on the role of the court in interpreting laws written in the past by an elected legislative body? Just to follow-up on some of the questions.

Judge SHWARTZ. Sure. The court is duty-bound to recognize that if legislation comes before it presumed to be constitutional, if there's a challenge made to it, the court would apply the standards that are applicable.

When a court gets a statute in front of it and it's called upon to apply it to a set of facts, of course, it first looks to the plain text of the statute. If there's ambiguity in the text, the court would then turn to the interpretation tools it can use, such as looking at precedent, looking at the provision in the context of the overall statute, looking at legislative history, if that is helpful.

So those are among the tools the court would use.

Senator COONS. And just to return to this topic, in your two sessions visiting with Senator Menendez—in introducing you earlier in this hearing, Senator Menendez actually specifically quoted Aristotle, if I remember correctly.

Judge SHWARTZ. He did.

Senator COONS. Character is the best persuader, and said that he was persuaded to actively support your nomination because of your character.

To be clear, you answered some questions about your conversations with Senator Menendez. Did you at any time give him any assurances about a future decision or an inclination as to how you might decide any case or controversy that might come before you?

Judge SHWARTZ. I did not nor did he ask me anything like that.

Senator COONS. Thank you, Judge Shwartz.

Senator Lee.

Senator LEE. Thank you, Mr. Chairman.

I want to get back to this speech for just a minute. I understand this is 25 years ago. It was at your law school graduation. You were probably trying to impress your friends and classmates.

But there are a couple of statements in there that are fairly strong and I just want to make sure I have a good feel for how you approach the law.

Judge SHWARTZ. Sure.

Senator LEE. One of the segments of that quote that I think did not come out during the previous questioning was a suggestion you made that lawyers should, quote, “manipulate preexisting doctrine to best accommodate the demands of a greater society.”

Now, from the prior question, I gather that you do not believe judges should manipulate the law.

Judge SHWARTZ. That’s correct.

Senator LEE. But do you believe that it is proper for lawyers, as officers of the court, to manipulate the law?

Judge SHWARTZ. My word choice was poor. I wish that what I had said was that lawyers are allowed, under the rules of ethics, to make good faith estimates based upon the existing doctrine, and that—I wish I had used those words. I wish I was as conversant with word choice at that time as I may be today.

Senator LEE. We are not all as sophisticated the day we graduate from law school. We might hope to be later.

So you would say then, Judge, that you would not phrase this the same way today.

Judge SHWARTZ. That would be correct.

Senator LEE. This does not accurately reflect how you would counsel lawyers in your courtroom today.

Judge SHWARTZ. No. Indeed, I expect lawyers, as do all my colleagues in the district of New Jersey, to have the highest ethical actions by those lawyers as good advocates on behalf of all their clients.

Senator LEE. Do you have any particular judicial role models who have served on the U.S. Supreme Court in the last century?

Judge SHWARTZ. My mother taught me something very important. Love all your children the same. And I’m not blessed with children, but I love all my judicial officers the same and I know that you have a particular judicial officer that you have perhaps a strong feeling with, as does Senator Coons, and so I’m hesitant——

Senator LEE. I am a member of the third circuit, in fact.

Judge SHWARTZ. Indeed. So I’m hesitant to say that and it’s not—no disrespect to the Supreme Court, but you can’t help but be touched by the judge with whom you worked most closely.

Senator LEE. Would you feel more comfortable answering the question if I allowed you to mention only those who have gone on to a better world who are no longer living?

Judge SHWARTZ. I love all my children the same.

Senator LEE. Very well said. I can see that you were an effective advocate in the court before you became a judge.

Thank you, Mr. Chairman. I have got no further questions.

Senator COONS. Thank you, Senator Lee.

Senator Grassley had requested a second round.

Senator GRASSLEY. Yes. According to your Senate questionnaire on December 21, 2010, you spoke to a high school group on the role of the U.S. court system and our government. In your handwritten notes, you discuss current subjects and cases that have been the subject of debate.

You included the decision in Citizen United, the issue of civil unions, and whether terrorists should be tried in military tribunals or in Federal courts. In your notes, this discussion comes under the bracketed heading of “court role is politics.”

What specifically do you mean when you say “court role is politics?”

” What is your general view on the role politics plays in the judicial decision-making? And do you believe it is the role of a judge to make rulings based on desired outcomes or policy preferences?

Judge SHWARTZ. Again, to answer your last question first, it is not the court’s role to decide things based on policy. That’s what the elected officials do. Courts make decisions based upon the law and the facts in front of them following the binding precedent.

If I could give you a little context, first, my handwriting is not terribly legible. The background to that, those notes, is I was invited to speak to a group of high school students called “The Voters of Tomorrow.” And my good friend who asked me to do this, young Jack, who was a sophomore at the time, he said, “I want you to come and talk about politics.” And I said, “Well, I can’t, for a few reasons. One, I’m certainly not well versed in that subject. Second, it’s improper. I’m a judge.”

”Well, maybe you can talk about some intersection with the court.” And so I was trying to think of subjects that would be recognizable to that group of individuals. They were basically freshmen to high school seniors.

And so what I was trying to do was identify cases that subjects that may be of interest to them and familiar to them would come up, and that’s how I ended up making some notes to that effect so that I could talk to them about these cases without talking about my views of the cases, just to try to make it a little bit more concrete for them.

Senator GRASSLEY. As an assistant U.S. attorney, did you ever prosecute someone who was death penalty eligible? If so, have you ever sought the death penalty?

Judge SHWARTZ. I was assigned to a case when I first started. I was maybe on the case for about 2 weeks and it was right after I had ended my clerkship.

And I was then taken off that case, because it was assigned to the judge that I had just clerked for. So that was my only contact with a death penalty case.

Senator GRASSLEY. So I think you answered my second part of that. Do you believe that—so then I will ask you a little different approach.

Do you believe that the death penalty is an acceptable form of punishment?

Judge SHWARTZ. The United States Supreme Court, in its precedent, has found that it is acceptable in all but a few circumstances.

Senator GRASSLEY. In *Roper v. Simmons*, the Supreme Court relied on foreign law in holding that the execution of minors violated the Eighth Amendment. Do you think it is proper to look to foreign law to determine the meaning of the Eighth Amendment of the U.S. Constitution?

Judge SHWARTZ. My view is that the American law governs cases brought in the United States courts, and I would follow the American law on that subject.

Senator GRASSLEY. A little more general question along the same line. Do you believe it ever appropriate for a judge to consult foreign law when determining the meaning of the U.S. Constitution?

Judge SHWARTZ. The U.S. Constitution should be governed by

U.S. precedent, and that's what should guide interpretations.

Senator GRASSLEY. Thank you very much. Thank you, Mr. Chairman.

Senator COONS. Any further questions, Senator Lee?

Judge Shwartz, I noted that Governor Christie, who I believe served with you when he was U.S. attorney, said to us, in support of your nomination, that you have committed your entire professional life to public service and New Jersey is the better for it.

And I want to thank you for appearing before this Committee today and look forward to the steady progress of your nomination.

Thank you.

Judge SHWARTZ. Thank you very much for your time.

Senator COONS. Thank you.

STEVE SIX
TUESDAY, MAY 24, 2011
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:33 p.m., Room SD-226, Dirksen Senate Office Building, Senator Amy Klobuchar, presiding.
Present: Senators Grassley, Cornyn, and Lee.

OPENING STATEMENT OF HON. AMY KLOBUCHAR, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator KLOBUCHAR. I am pleased to call this nominations hearing of the Senate Committee on the Judiciary to order, and pleased to have our Ranking Member, Senator Grassley, here. I want to thank Chairman Leahy for allowing me to chair this hearing. As you know, we're starting on time.

I want to give a warm welcome to all of our nominees. We also welcome the family and friends that have accompanied all of you. You will have an opportunity to introduce them shortly.

Senator KLOBUCHAR. I believe that Senator Hutchison is going to be joining us shortly. Before Senator Grassley gives an opening statement, I would like to introduce the rest of our nominees.

Steve Six has been nominated to serve on the U.S. Court of Appeals for the Tenth Circuit. Currently he is a partner at the Kansas law firm of Stevens & Brand. He is also a research scholar with Columbia University Law School's State Attorney General program. Mr. Six previously served as the Kansas Attorney General, and he even has experience living in Minnesota. I knew you would be interested in that, Senator Grassley. He graduated from Carlton College in Northfield, Minnesota, before attending the University of Kansas School of Law.

Now I'm going to turn it over to Senator Grassley for any opening remarks he would like to make.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. I extend my welcome to the nominees appearing before us today. I also welcome their family and friends, and I know you're proud of your family and friends that are being nominated for these prestigious positions.

I'm eager to hear testimony and I'll be asking many questions. I expect the nominees will fully answer my questions. Too often, nominees appear before us and fail to give meaningful responses. Unfortunately, a well-worn response that we get to questions, meant to have questions of substance, we too often hear, "I will follow the law, if confirmed". That type of response, which sounds coached, even robotic at times, doesn't really get us very far with understanding the competence, integrity, and temperament of a particular nominee. It certainly gives us no insight into the thought process, legal reasoning skills, or general judicial philosophy of the nominee.

I am going to insert the rest of my statement in the record because it's very long. So, I'll yield the floor.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Senator KLOBUCHAR. OK. Thank you.

I will now ask our first nominee, Mr. Steve Six, to come forward and remain standing and raise your right hand. I'll administer the oath.

[Whereupon, the witness was duly sworn.]

Senator KLOBUCHAR. Thank you. Have a seat.

Mr. Six, do you want to take a moment to introduce anyone who is with you here today at this hearing?

STATEMENT OF STEVE SIX, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE TENTH CIRCUIT

Mr. SIX. I do. Thank you, Senator Klobuchar, for that kind introduction, and Senator Grassley, for those welcoming remarks. Introducing my family who is with me here today supporting me, I'll start with my wife Betsy. My wife of 15 years. Going in age from the oldest, my daughter Emily Six, Sam Six, Henry Six, and Will Six. And I'm also fortunate to have my parents, retired Supreme Court Justice—Kansas Supreme Court Justice Fred Six here, and my mother, Lillian Six. Thank you all.

Senator KLOBUCHAR. That's almost six Sixes.

[Laughter.]

Senator KLOBUCHAR. That's very good.

Mr. SIX. I do thank the Committee for allowing me to have this hearing today, and look forward to your questions.

Senator KLOBUCHAR. Well, very, very good. I have a few questions. I know it sounds like Senator Grassley has some questions as well.

Could you talk about how you describe your judicial temperament and why you think you'd make a good judge?

Mr. SIX. Well, thank you for that question, Senator. In my past work experience, I had the honor of serving as a State judge in our Kansas system and the approach that I took in that position was to really try to show up every day and work hard on being fair, to be independent, and to do what sounds kind of trite, but to impartially apply the law as I saw it to the facts that appeared before me. That's the judicial philosophy I practiced for the time I was a State court judge, and what I'd hope to do if I was fortunate enough to be confirmed to this position.

Senator KLOBUCHAR. Thank you. And has your father passed along any ideas to you?

Mr. SIX. Well, he has been very influential in my life, certainly in a lot of ways. I don't know that there's any particular judicial lessons he's passed on. It's been more certainly ethics, integrity, how do you present yourself, what does your word mean when you give it to someone, and really how to practice law in, I think, a very gentleman-like or professional fashion.

Senator KLOBUCHAR. So going to the Circuit Court, if you're confirmed, is a little different than being a District Court judge or a State Court judge, as you will be working with many judges, active senior judges. And do you think it's important to seek out agreement with your colleagues? Is there value to finding common ground, even if it slightly narrower in scope, to get a unanimous opinion? What are your views on that?

Mr. SIX. Well, I think what I've learned over my legal career, both in the private sector and public sector, is that it's important

in the law to have a vigorous debate about what you believe a statute may be or what the cases say about the law or the precedents. Whether you're doing that with lawyers in private practice or, as I did when I questioned lawyers when I was a judge, you can have that vigorous debate but still when you're done be civil and get along.

And certainly I would anticipate, if I was fortunate enough to be confirmed, that I would have a vigorous debate with my colleagues on a panel, respecting other views, listening to other views. But at the end of the day, you need to make your own decisions and hold true to what your principles or beliefs are in the law that you've studied.

Senator KLOBUCHAR. Thank you.

Then last, Mr. Six, as Kansas Attorney General you played a role in, or commented on, many high-profile matters, like prosecuting child pornographers. As a former prosecutor, I know that that is—I believe it's very useful experience. How do you think that will play into your background as you look to the Circuit Court judgeship?

Mr. SIX. Well, as—as someone with young children, when I was Attorney General, one of the priorities that soon came to my attention was the dangerous that young children are facing online in various ways through all kinds of activity. That certainly was a priority and, when you're working hard for something that you think and believe in, it's sort of like not even going to work in the day because you enjoy the work so much. You know, that was important work to me in those positions.

And, you know, I advocated for a lot of things as Attorney General, but I certainly recognized that there's a difference in our foundation and form of government in the separation of powers between someone's role in the executive branch, and certainly the judicial branch.

Senator KLOBUCHAR. Well, thank you.

Senator Grassley.

Senator GRASSLEY. Mr. Six, I understand you have the support of two Republican Senators from your State. I congratulate you on that.

I have some questions, as I indicated. When you were appointed Attorney General in 2008, there was an ongoing controversy related to the investigation of Dr. Tiller and the Planned Parenthood Clinic and the allegations that they were performing illegal, late-term abortions. Your predecessor closed the investigation and wrote Planned Parenthood a letter, stating that no charges would be filed. The District Attorney continued to pursue charges.

According to media reports, you refused to reopen the investigation even though Judge Anderson testified that there were discrepancies in the Planned Parenthood medical records, and that those discrepancies raised “substantial, factual and legal issues about their competence within the law”.

My first question: if you were aware of Judge Anderson's concerns about the medical records prior to making your decision, why didn't you reopen the investigation?

Mr. SIX. Well, thank you for that question, Senator. As you mentioned, prior to me being appointed Attorney General we had had a period going back to two prior Attorney Generals where the issue

you were talking about had been vigorously engaged in a back-and-forth between them. We had an Attorney General that then resigned. When I was appointed, I stepped into some of those challenging issues. There certainly weren't any issues that I sought out, but tried to handle them in the most professional way that we could.

We had Assistant Attorney Generals who were working on the case. And like all criminal cases, as the Attorney General, I have a Criminal Division and prosecutors who handle the cases. I don't in any case in our Criminal Division tell the prosecutors what I think they should do or not do. They're given their ethical duties and responsibilities and instructed to seek a conviction for charges that they believe evidence supports. For all the cases we handled in the Attorney General's Office, that's what I did.

Senator GRASSLEY. Well, where——

Mr. SIX. And the issues——

Senator GRASSLEY. Were you aware of Judge Anderson's concerns prior to making your decision?

Mr. SIX. Well, there was never a decision on my part to pursue or not pursue that case. It simply wasn't something that was going on. The different——

Senator GRASSLEY. Were you——

Mr. SIX. The different cases, including the prosecution of George Tiller, was going on. That continued after I became Attorney General and there were various issues that went up to our Kansas Supreme Court on sensitive medical records. We continued to bring those to the attention of the Supreme Court because they had previously entered instructions for us about how we were to handle those records, and we were very sensitive about that because the prior Attorney General is before the disciplinary board of our State now and has been sanctioned in limited ways by our Supreme Court over various activities relating to that. So I was very sensitive to always bring it to the court and let the court make the decisions.

Senator GRASSLEY. Were you ever subject to any pressure or communication with the Governor of the State or anybody in the administration not to pursue charges against Planned Parenthood?

Mr. SIX. The Governor at the time I took office was now Secretary Sebelius, and I never had a discussion with her about any topics or any cases in the Attorney General's Office in our Criminal Division. We would occasionally brief her on cases before the State. We had a lottery case——

Senator GRASSLEY. You've answered my question. That's OK.

Mr. SIX. Thank you.

Senator GRASSLEY. While your office refused to continue the investigation of Planned Parenthood, Mr. Phil Kline, who was District Attorney and former Attorney General, continued the case.

Did you ever seek to impede his prosecution of Planned Parenthood?

Mr. SIX. Again, when I took office this litigation had been going on for some period of time. The judge you mentioned had previously testified in a hearing overseen by our Kansas Supreme Court before I became Attorney General. The case you've just referenced, the judge received a subpoena to appear in District Court and testify. When any judge in the State is subpoenaed or receives—is sued, they contact the Attorney General's

Office for representation.

In this case, that is what happened. Given the sensitive nature of the case I thought it would be best to apply outside counsel outside of the office to him. He, under our procedure, got his own attorney and the matter was referred again to our Kansas Supreme Court. The Kansas Supreme Court then issued orders about what the judge should and shouldn't do, and that was the appropriate forum, I thought, for how it should be handled.

Senator GRASSLEY. Is that your answer then also to why did you continue to have legal action to compel Mr. Kline to return all documents that he retained from the investigation in the Attorney General's Office?

Mr. SIX. Again, the medical records, these private patient medical records, were the subject of an order by the Kansas Supreme Court about how they were supposed to be handled. When Mr. Kline left office, he took the entire file and the records with him on the morning he left office. Then another Attorney General, Attorney General Morrison, went into office and he started a case to get those materials returned. That started sometime in January of 2007.

I became Attorney General in February of 2000—or January 30, 2008. And at the time I became Attorney General, my name was substituted into the caption where the previous Attorney General's name had been. The court ordered that the lawyers show up for oral argument. An Assistant Attorney General from my office showed up and argued the case and again said that these patient records should be redacted to remove identifying information and they should be managed in a secure law enforcement way and put the matter before the Supreme Court.

Senator GRASSLEY. The case brought against Planned Parenthood relied in part on Kansas' late-term abortion law. Recently Kansas amended their abortion law to bar abortions at 22 weeks gestation, except to save the mother's life. Do you believe that the Kansas law is consistent with the Supreme Court's decision of Planned Parenthood v. Casey, where the court said that abortion restriction cannot impose "an undue burden"?

Mr. SIX. You know, when I was Attorney General I did not evaluate that issue. And since I've gone into private practice I haven't had any similar issues like that come out and I haven't read the Kansas statute. I simply haven't studied it, Senator.

Senator GRASSLEY. I think I'll put the rest of the questions for answer in writing.

[The questions appear under questions and answers.]

Senator KLOBUCHAR. OK. Very good. Thank you.

Senator Lee.

Senator LEE. Thank you very much, Mr. Six, for joining us. I have a special interest in the Tenth Circuit, in part because it includes my State. So, thank you for being with us today.

While you were serving as Attorney General of Kansas, 13 States originally filed a lawsuit challenging the constitutionality of the Affordable Care Act, also known as Obama Care, insofar as it relates to the individual mandate aspect of that. It's my understanding that Kansas, after you left office, later became one of the now 26 States. Some of the original States included Florida, Michigan,

Pennsylvania, Washington, a whole host of others, including Utah. Kansas has since joined then. A total of 60—26 States have joined in on this, a majority of them—a majority of all States.

But when the question was presented to you as to whether or not you wanted to sign documents getting your State involved in it, you were quoted as saying “arguments have been advanced that the law’s requirement that all individuals purchase health insurance is unconstitutional. Under current U.S. Supreme Court precedent, such an argument is highly unlikely to succeed”. Now, that litigation is still ongoing. We’ve had a couple of courts issue opinions going a couple of different ways. But needless to say, it has proven to be a complex issue, certainly not a straight up-or-down issue. I was wondering if you could just talk to me briefly about kind of what you had in mind, what precedent you were relying on in saying that this is highly unlikely to succeed and that it would be essentially a waste of taxpayer revenue to become involved in a lawsuit.

Mr. SIX. Yes. Thank you, Senator Lee. What I did with all issues that appeared in the Attorney General’s Office, was they would come in and we’d try to apply the best analysis we could. I don’t know when in the course of time I made that statement, but, you know, I assigned various claims, the six or so claims under the individual or employer mandate to lawyers in the office. They researched them. They returned reports that we then reviewed. And my opinion after that review was that the great majority of the claims looked unlikely to succeed. I think that’s proven true perhaps through all the courts, that maybe four of the claims have uniformly been dismissed.

The other thing I did then on the individual mandate, which I think was the most challenging aspect, was we reviewed it as to the State Attorney General, because that’s the decision we’d been making. Our analysis was that under the standing cases, that the State Attorney General didn’t have the authority to pursue the individual mandate claim. And for those reasons, I thought that our State, you know, given the limitations and the challenges we were facing, had other cases and things that we were struggling to meet the demands of, and for the resources that would be required to get involved in that. You know, we decided not to, and ultimately my view was it would go to an appellate court and the Supreme Court and that would apply to our State anyway.

Senator LEE. So it was your conclusion that the State would lack Article 3 standing or prudential standing in order to bring that?

Mr. SIX. You know, I did not review what the conclusion was before appearing here today. I can just recall, as we analyzed it, as it applied to the Attorney General bringing that claim, we didn’t think we had standing.

Senator LEE. OK. But your recollection is that your analysis was based on standing rather than on the merits position on the substantive legal outcome?

Mr. SIX. The standing issue is what we felt like would be determinative on the Attorney General bringing that. We knew that in that case there were individual plaintiffs that may be advancing the claim, and so if it was going to succeed it would apply to our State. And, you know, the final reason really was that our—under

our Kansas statutes, the House or the Senate can pass a resolution to have the Attorney General file a lawsuit and the House had that resolution and they voted it down. And certainly we didn't want to be in a position where we were advancing a case that the House and the people at least voted down as far as pursuing.

Senator LEE. Sure. Sure. But that wouldn't affect your standing analysis.

Mr. SIX. No, not on a legal——

Senator LEE. I mean,—has standing or he doesn't.

Mr. SIX. Correct.

Senator LEE. It seems odd to me that an Attorney General could be thought not to have standing to challenge a law that requires substantial investment on the part of the State to set up certain infrastructure with all kinds of mandates that are not necessarily funded, at least not directly to the States. But I understand that to be your position.

Now, in response to the argument that the unfunded mandate requiring the States to expand the eligibility standards for Medicaid, or else, you know, in the alternative, lose risking—risk losing Federal funds. In response to an argument that that might violate the State's rights, the State's Tenth Amendment rights, you argued, as I understand it, that this was a policy argument, not a constitutional argument. How can you defend that statement in light of *Prince v. United States* and the acknowledge that the Federal Government cannot commandeer State executive or legislative machinery in order to adopt or implement a Federal legislative or administrative program?

Mr. SIX. Well, I don't recall the context. I don't dispute that I made that statement and that it's accurate. I don't recall the context of what I said at that time. And unfortunately, Senator, I apologize, but I don't know what the *Prince* case—I have not reviewed that.

Senator LEE. OK. But if—in light of that precedent, let's just—just take for a moment—I understand that you haven't had an opportunity to review *Prince*, but that would make it a constitutional argument as opposed to a policy argument, would it not?

Mr. SIX. I would say that all of the arguments should be legal arguments and would be decided in a court of law as opposed to a policy. So that might have just been a loose statement on my part. As you know, when you are in the time period we're talking about, I imagine that when I was campaigning for Attorney General, and you make a lot of statements all day all over the State, I would agree that it is a legal argument on each of the claims that have been advanced in the Florida lawsuit as to whether they are constitutional or not constitutional, and those would not be policy arguments.

Senator LEE. All right. I see my time has expired. Just as I would do if I were arguing before the Tenth Circuit, I'll yield the floor.

Mr. SIX. Thank you, Senator.

Senator GRASSLEY. I have one more.

Senator KLOBUCHAR. OK. One more thing, Senator Grassley. Then I had a few follow-ups.

Senator GRASSLEY. I'm going to—even though I asked you a lot

of questions about the Planned Parenthood case, I would ask you to submit a full statement regarding your actions and involvement with regard to that case. Then as a result of that, I may have follow-up questions after I review your statement. Would you agree to do that?

Mr. SIX. Certainly, Senator.

Senator GRASSLEY. Thank you.

Senator KLOBUCHAR. Thank you. I'm sure I was listening to your exchange with Senator Lee, and I would hope he would put that question in writing so you'd have a chance to look at the case and expand on that more after you have a chance to look at what you said and what the case said.

Mr. SIX. Thank you.

Senator KLOBUCHAR. All right. Very good.

And I just want to confirm here, both Senator Moran and Senator Roberts, two Republican Senators, are supporting you for this position?

Mr. SIX. You know, I have had a conversation with Senator Moran and I wouldn't presume to——

Senator KLOBUCHAR. Well, they've allowed your nomination to go forward. Let me put it that way.

Mr. SIX. I am here today.

Senator KLOBUCHAR. OK. Very good.

Senator Lee.

Senator LEE. Do we have time for one more round of questions? I just wanted to follow up on a couple of issues.

Senator KLOBUCHAR. Sure. I'm actually asking some now.

Senator LEE. Oh. Oh, great. OK.

Senator KLOBUCHAR. I'm doing my second round and then that would be great.

Senator LEE. Then I will follow you. OK. I just wanted to make sure.

Senator KLOBUCHAR. OK. Excellent. Very good.

And then the—I wanted to follow up a little bit on this—the questions involving your role as Attorney General. Obviously you were Attorney General representing the State of Kansas in litigation and other matters. Could you describe how you see the role of Attorney General different than the role of a judge, a Circuit Judge?

Mr. SIX. Well, thank you for that question, Senator. Certainly as Attorney General, you are an advocate often for positions, whether they relate to public safety or other types of activities the office may pursue. At the same time, you're also the legal representative of the State and you defend statutes passed by the State legislature as to their constitutionality. You certainly do that whether you believe it's the right view or the wrong view, or a good statute or a bad statute. It's just your role to support what the legislature has done. So we did that in various ways and represented the State, and certainly if I were fortunate enough to be confirmed, I understand that under our separation of powers, as a judge you're in a completely different role.

Senator KLOBUCHAR. Right.

And with regard to the discussion on the patient protection Affordable Care Act, in that role you looked at the law and made a

legal analysis. Is that right?

Mr. SIX. Not only that, I assigned it to our Assistant Attorney Generals, experts in various areas, and had them submit reports back to me. Then we met and talked about that. The conclusion not just of me but the research attorneys, the four or five of them in the office that were part of the team and were attorneys that were there prior to my becoming Attorney General, supported the view that I had in the discussion with Senator Lee.

Senator KLOBUCHAR. And it sounds like the—just looking at the numbers, the States were basically split on this, whether to get involved in this suit or not. Is that right?

Mr. SIX. Well, it's—

Senator KLOBUCHAR. Or this appeal.

Mr. SIX. It appears to be a bit of a rolling boulder gaining some speed, so there are more on now than at the time we made our decision.

Senator KLOBUCHAR. OK. Very good.

And the—and you also were involved and you wrote a letter objecting to that Nebraksa compromise. Is that correct?

Mr. SIX. That was shortly before the bill was passed. There was the Cornhusker kickback, or the Nebraska compromise, what they were calling it. Essentially as I understood it, and it was a—

Senator KLOBUCHAR. I suppose you said we have more corn in Kansas.

Mr. SIX. You know, I don't know if we do or not. But certainly the view of the people in Kansas was that they shouldn't be treated any differently or unfavorably from perhaps the folks in Nebraska. It was a complicated act and a lot of pages. From what we could gather, that was one of the potential results. I wrote a letter to the Congress suggesting that perhaps we shouldn't proceed that way.

Mr. SIX. And just to clarify the Tiller questions that Senator Grassley had asked, that in fact your office actually prosecuted Tiller on misdemeanor charges. Is that right?

Mr. SIX. That's correct. When I took over as Attorney General I didn't go back through every case in the office and interject personal opinions into them. We had qualified prosecutors who were pursuing them. The cases that Senator Grassley discussed with me and the case against Dr. Tiller, I took over, and the cases continued with the Assistant Attorney Generals pursuing them, applying their ethical duties as prosecutors, and handling tough cases. There wasn't anybody in the office that would have chose to do that, but when it's your job as a prosecutor that's what you do.

Senator KLOBUCHAR. And then just to clarify for the record, Dr. Tiller was the doctor that was killed during church. Is that correct?

Mr. SIX. That's correct.

Senator KLOBUCHAR. Thank you very much.

Senator Lee, you had more questions to ask?

Senator LEE. Thank you very much.

I just wanted to follow up on our previous line of questioning. I noticed that on October 24, 2010, in a local paper in your State, you noted an explanation for your analysis that really wasn't related to the lawsuit, it was related to the constitutionality of the Affordable Care Act generally, saying, "Following a thorough legal analysis I determined that there were no constitutional defects with the new health care law", which is different than just saying

there's no standing problem.

So in light of that, I want to delve into some of those issues for a minute if we could, dealing with the individual mandate. Would you agree, first of all, that James Madison got it right when he said in Federalist #45 that the powers of the Federal Government are few and defined, while those reserved to the States are numerous and indefinite. Do you agree with that general principle?

Mr. SIX. I would agree with that. I believe the Tenth Amendment supports that.

Senator LEE. OK. And in light of that, if in fact the powers of the Federal Government are few and defined, then there does have to be some limit on Federal power.

Now, if Congress can wield the power necessary to tell individual Americans, individual Americans living within some State, whether it's Utah, or Kansas, or some other State, if Congress has the power to say to such a person, you must go out and you must buy a specific product, not just any product, but health insurance, the kind of health insurance that we in our infinite wisdom tell you that you must buy.

Isn't there a real slippery slope there in the sense that if we can do that and if we can then tell people they've got to buy that or else pay a penalty because it's good for their own health, what would then stop us from telling people that they need to go out and buy two servings of green, leafy vegetables every single day and eat those so that they will be healthy? Couldn't we do that?

Mr. SIX. Well, I understand the principle you're talking about and I think the Supreme Court, in the *United States v. Lopez* and *United States v. Morrison* cases, talked about the limits that you've just articulated. And I certainly would follow those precedents and that guidance. I think it's difficult of course to decide cases in the hypothetical. I think requiring somebody, just thinking about it as you presented it, to ingest something probably raising some substantive due process arguments that may not exist to having to buy something.

But I certainly understand the concept you're talking about, and if presented with that I would try to apply certainly the guidance that the Supreme Court has, and hopefully very soon maybe some analogous guidance that may come out of the Fourth Circuit, or certainly from the Supreme Court when they get this issue.

Senator LEE. Well, and in fairness if the hypothetical statute we were addressing were one just requiring you to ingest it, in addition to any substantive due process problems that might present, that also would be something regulating non-economic activity, eating, as opposed to actually purchasing health insurance.

But couldn't we change that simply by saying you must purchase? In other words, you must take the first \$200 a month out of your paycheck and buy two servings of green, leafy vegetables. We're not going to enforce it to make sure you actually eat it, but you have to buy it. How do you distinguish that from the individual mandate in the Affordable Care Act?

Mr. SIX. Well, I think it is not something that I have analyzed approaching for today and the hypothetical you have referenced. It certainly is, I think, a similar analysis.

Senator LEE. And if there are in fact limits on Federal authority,

they would certainly have been breached by the time we get to the point of telling people they have to buy \$200 of green, leafy vegetables every month.

Mr. SIX. That seems like an example that perhaps, if you just polled the room here, most people would agree with, I'd say.

Senator LEE. OK. And would they be right?

Mr. SIX. Again, it's hard to decide things in advance in a specific way or commit to what I would rule if that case would appear before the court. But I certainly hear what you're saying and it has a very solid sound to it.

Senator LEE. OK. Thank you.

Thank you very much.

Senator KLOBUCHAR. Anything else?

[No response].

Senator KLOBUCHAR. Well, thank you very much, Mr. Six.

Mr. SIX. Thank you.

Senator KLOBUCHAR. I see one of your sons is yawning. I won't say which one.

[Laughter.]

Senator KLOBUCHAR. But I thank you for appearing before us today. We look forward to hearing from you again. The record will stay open for any additional questions for 1 week. Thank you very much.

Mr. SIX. I appreciate the Committee's time. Thank you.

JANE STRANCH
WEDNESDAY, OCTOBER 21, 2009
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Committee met, pursuant to notice, at 2:53 p.m., Room SD-226, Dirksen Senate Office Building, Hon. Amy Klobuchar, presiding.
Present: Senator Sessions.

OPENING STATEMENT OF HON. JEFF SESSIONS, A U.S.
SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. I see the surprise on my two Tennessee Senators' face. I'm calling the meeting to order, but I'm authorized to do so by the Democratic leadership.

We'd be glad to hear your statements at this time on the nominees, the nominee that you'll be speaking on. All of us on the Committee value very much the opinions of the State Senators.

Senator Alexander.

PRESENTATION OF JANE BRANSTETTER STRANCH, NOMINEE
TO BE U.S. CIRCUIT JUDGE FOR THE SIXTH CIRCUIT BY HON.
LAMAR ALEXANDER, A U.S. SENATOR FROM THE STATE OF
TENNESSEE

Senator ALEXANDER. Thank you, Mr. Chairman. I knew Republicans were doing better, but I didn't know it had come this far.

[Laughter.]

Senator ALEXANDER. So, thank you. It's my great pleasure today to introduce to the Committee Jane Branstetter Stranch from Nashville, Tennessee. She's been nominated by the President to be a judge on the United States Court of Appeals for the Sixth Circuit. She has a distinguished academic background: summa cum laude, Phi Beta Kappa from Vanderbilt, Vanderbilt School of Law, top grades there. She has lots of practical experience, having taught law at Belmont—labor law at Belmont College. Her law firm is a family affair. Her father, who I think is watching today, is one of Nashville's best-known and most respected attorneys, Cecil Branstetter. He introduced legislation to allow women to serve on juries back in the 1950s, so I know he gets some special pride today to see that his daughter has been nominated by the President to be a judge.

Maybe more important than any of these other things, she's been very active in the PTA, in her church, and in the community in Nashville.

So, Senator Sessions, Mr. Chairman, as Governor, I appointed about 50 judges. I didn't ask them their politics, I didn't ask them how they felt about issues. I tried to determine if they had the character and the intelligence and the temperament to be a judge, whether they would treat people before the bench with courtesy, and most important, whether they were determined to be impartial to litigants before the court, and I am convinced that Jane Stranch will be and I'm pleased to recommend her to the Committee.

Senator SESSIONS. Thank you, Senator Alexander. I know, having watched you in the Senate, that you, as a lawyer, have high ideals for the bench, and I appreciate so often your input into the discussions involving the judiciary and legal issues in the Senate.

Senator Corker.

PRESENTATION OF JANE BRANSTETTER STRANCH, NOMINEE
TO BE U.S. CIRCUIT JUDGE FOR THE SIXTH CIRCUIT BY
HON. BOB CORKER, A U.S. SENATOR FROM THE STATE OF
TENNESSEE

Senator CORKER. Well, thank you, Mr. Chairman. It is good to see you in that role. I am just thinking, as you said that. Lamar has done so many things in his life that were so distinguishing, I forgot that he was a lawyer.

[Laughter.]

Senator CORKER. So I'm glad you're——

Senator SESSIONS. As a businessman, that's probably all right.

Senator CORKER. I am pleased, always, to come before this Committee, and others, with Tennessee who have been recommended for positions like this. We are proud of the people that have served our country in public office. Jane Stranch is someone who I haven't gotten to know except through this process. What I do know about her though, and I know this for a fact, she comes from a family that is one of the most esteemed families in Nashville.

I have served with her brother on civic boards and know of the type of character that this family embodies. I know she's here with people that I greatly respect who are in support of her nomination. I can tell you that I know that she is someone who cares deeply about her community. I know she embodies integrity in everything that she does, and I'm very happy to be here today with Lamar Alexander, supporting her and being presented to this Committee. I know this Committee will go about this process in a very fair way, as this Committee has done in most recent times, and I look forward to that process. I look forward to hearing what the Committee's recommendation is. But I am very, very honored to be here and I thank her for her willingness to serve our country in this regard. I know I talked at length with her about that, and while she, I know, loves serving as an attorney in her community and has represented many people across this country, I know she feels it's time for her to give back in this way. So, with that, Mr. Chairman, I thank you, I thank Lamar for allowing me to join him, and I certainly thank Jane Stranch for her willingness to serve her country in this way.

Senator SESSIONS. Thank you very much. Good words, indeed.

Senator CORKER. I am looking forward to your filibuster at this point.

[Laughter.]

Senator SESSIONS. I will ask that the nominees step forward. If you would raise your right hand and remain standing, we'll take this oath.

[Whereupon, the witnesses were duly sworn.]

Senator SESSIONS. Thank you. Please have a seat.

We will just be delighted to hear any comments each of you have, and then if you would like to introduce family or guests that are with you, we would be pleased for you to do that.

I guess, Ms. Stranch, do you want to start? We'd be glad to hear from you.

STATEMENT OF JANE BRANSTETTER STRANCH, NOMINEE TO
BE U.S. CIRCUIT JUDGE FOR THE SIXTH CIRCUIT

Ms. STRANCH. Thank you. I would like to introduce my family members and friends who are here, if I might: my husband of 37 years and my law partner, Jim Stranch; our oldest son Gerard, who practices law with us, and his wife Patty, who is an attorney also. They did not bring their 2-year-old son, our oldest grandchild, for obvious reasons. But our daughter Abigail is here, Abigail Tyler, and she is here with our second grandchild, our 4-month-old, Hudson Tyler. With her is her friend, Elise Fellman, who is holding Hudson. Elise is an honorary daughter in our family.

I have my brother, Dewey Branstetter here, who is also my law partner, and his son Hunter Branstetter, who will begin law school next year. I have friends with us also. George Barrett and Mary Barrett Brewer are here in support of what's going on today.

I would also like to say that there are a few people that could not come whose names I would like to mention. Our other two children, Ethan and Grace, are not able to be here because they are observing the Stranch rule that studies come first, and they are at school in Memphis, med school and undergraduate school.

My parents, Cecil and Charlotte Branstetter, were not able to be here today. My father will be 89 in December and does not travel as much as he did previously, but would say to you how grateful he is for this opportunity for me. As Senator Alexander indicated, he served in the Tennessee legislature for one term and sponsored the bill that allowed women to serve on juries, because they had not before. I think it's an honor, and in a way coming full circle, that he has a daughter now that might be able to serve as a judge. So, I appreciate your time. I appreciate being nominated by President Obama, and I appreciate so much the introduction of our Senators. I know that they believe what I believe: ultimately we're Tennesseans working together to make this system function well. So, I am grateful. Thank you.

Senator SESSIONS. We are joined by Senator Klobuchar. We just had the opening statements from the two home State Senators, Alexander and Corker, and Ms. Stranch's statement.

Senator KLOBUCHAR. Well, very good. Congratulations, Ms. Stranch, on your nomination. I was very impressed when I looked at your background and your legal career and the fact that you also have done all this with both—is it true you practice with your husband? Is that right?

Ms. STRANCH. Yes.

Senator KLOBUCHAR. And that's also a big thing. Very good.

Ms. STRANCH. And with our son and with my father, which makes it a bit difficult to get away from the practice.

Senator KLOBUCHAR. Well, this certainly shows that you get along with everyone and are able to work out conflicts in the workplace.

Senator KLOBUCHAR. Thank you very much.

Do you want to begin, Senator Sessions?

Senator SESSIONS. No, go ahead.

Senator KLOBUCHAR. OK. Ms. Stranch, you're one of our—you know, we have had a number of people, nominees, come through for judge jobs, and you're one of the first that didn't actually have judicial experience. I don't necessarily think that is a bad thing, but I want you to talk a little bit about your legal practice and how you came to focus on certain areas of litigation.

Ms. STRANCH. I have over 30 years of experience in litigation, much of it in the Federal courts. I do believe that that would prepare me for a position as a judge. The primary emphasis of my present practice has been in ERISA, the Employee Retirement Income Security Act. In that, there is a broad range of work that I do. I do complex litigation across the Nation, representing individuals who have lost their pensions, and some of the corporate problems that have occurred in the past decade.

I also represent health funds, pension funds, as entity representation under ERISA, and represent individuals in pension matters.

That practice has taken me to many different courts and courts of appeals as well, and has given me the experience of being able to see different judging styles, shall we say, and hopefully to draw from those the best of what I've seen.

I also have an extensive labor law practice. I am proud to have represented working men and women across America, and individuals as well as labor organizations. That has given me statutory experience in interpretation of the law, as well as board experience in administrative capacities.

Probably the other largest component of what is a very general practice, coming from the South, we have a number of things that we do. And mine, the third one would probably be entity representation of small entities, primarily utility districts, which under Tennessee law are quasi-municipalities. I've provided the full range of defense and corporate work and instruction and entity representation to those districts that are very important in the State of Tennessee because they provide the ability for development in both commercial/industrial and residential. I think those are the primary components of what is a fairly general practice.

Senator KLOBUCHAR. Thank you.

And how would you characterize your judicial philosophy, if you had to describe it? What kind of judge do you want to be?

Ms. STRANCH. I would say that understands authority. Being a litigator over the years, I well recognize that when I go before a judge it's the judge who decides my case. Now I understand that if I am in the position of that judge, I am constrained by like limits: the law constrains me, the precedent constrains me, and I will honor and comply with those things that would govern how I would act as a judge.

Senator KLOBUCHAR. What about the precedents within your own Circuit? How much deference will you give to decisions on issues that aren't necessarily—have not been before the Supreme Court, but have been before your Circuit?

Ms. STRANCH. I understand the deference to existing law. Stare decisis would have a stand on the decisions as they are. Although the final word may not be through the Supreme Court, it would leave an opening to examine those issues in accordance with all of the law and facts that govern that particular case. I would do so, but always understanding that there is a deference to the cases that have been decided and that there is a reason for that deference, to assure the litigants that they can understand the nature of the law and its continuing applicability to the actions that they take.

Senator KLOBUCHAR. And how about when you are on panels and

you're working with the other judges? What's your view of trying to get consensus and agreement?

Ms. STRANCH. I have a strong belief in collegiality, and I think perhaps even a stronger belief in civility. Having practiced across this Nation in a number of courts, I would like to say that everywhere I go I receive the same reception, but I can't say that that's always the case. In some circumstances, the method by which courts are run is not always as civil as I would honestly like to see it be.

It's my belief that if you want the courts to be respected, then you need to treat both the litigants and the counsel before you with comparable respect. In doing so, that includes how I would treat the people that I would work with. As you know, I'm working with my family for a long time.

Senator KLOBUCHAR. That's the best evidence.

Ms. STRANCH. Self-restraint is a learned trait.

[Laughter.]

Ms. STRANCH. But I look forward to the collegiality of a court that I would be able to work with and share ideas with. I think it's extremely important.

Senator KLOBUCHAR. Thank you very much.

Senator Sessions.

Senator SESSIONS. Thank you. Good questions.

Well, I think your experience is a valuable one. I think you are right, that you may not know how to describe it, but you know some judges handle parties and litigants better than others. I appreciate, I think, a sincere commitment on your part to treat the litigants fairly and objectively and to render a decision based on the law and the facts, and comply with the oath, which is to be impartial. You will take that oath. It also requires you to do equal justice to the poor and the rich, and it also requires you to serve under the law, under the Constitution and the law of the United States, and not above them.

So I really appreciate people who have had a good practice. And, what? Eighty-something percent of your practice has been in Federal court?

Ms. STRANCH. It has been. That has been my expertise and my interest. I have enjoyed that.

Senator SESSIONS. One thing you haven't had much experience with, it appears, is criminal law, which is a big part of the Federal court and docket. The sentencing guidelines have, to a large degree now, been declared advisory, but they represent a huge commitment of time, effort, and research and data to try to figure out what appropriate penalties are for crimes and, I think, deserve a great deal of deference. I was rather flabbergasted when the Supreme Court declared them advisory, and still remain so. But irregardless, that is apparently the state of the law.

What deference and what approach would you take toward your responsibility to be in compliance with the guidelines, advisory or not?

Ms. STRANCH. I recognize that there has been an alteration in the guidelines from mandatory to advisory, but I also recognize that there's a great deal of law that exists out there on how the guidelines have been applied over time. That law is instructive and

is something that would have to be considered and looked to in each new case and to see how it applied to the particular facts of that case. So the governing rule for me would be, what exists in the law, what decisions are there, and were due process rights provided in accordance with the Constitution?

Senator SESSIONS. Well, I think that's true. I would just say to you, my advice—for what it's worth, as a prosecutor for 15 years in Federal court—I'd suggest start applying them, following them. As the years go by or the time goes by and you think that this case might be an exception—but there is a danger, because when I started prosecuting, judges could sentence a person from zero to 20 years, and some judges would give them probation and somebody else would give them 20 years for the same offense.

There was a real concern of aberrational sentencing, inconsistencies in sentencing. The amount of punishment a person got depended on the judge before whom they appeared. The guidelines have been, I think, a very positive development. I think the judges that have grown up under it feel real comfortable with it and I think most of them try to follow it whenever possible. You just don't want to get to the point of view of deciding the sentence based on the preacher's plea. They always have a preacher come plea. It's sad. I mean, these things are tough, they're no fun.

Ms. STRANCH. Thank you.

Senator SESSIONS. Now, as a judge, you're aware that rulings against prosecutors are normally not appealed. In a number of decisions you make, the prosecutor is unable to appeal. That's a pretty awesome power for a judge. I guess I would ask you, do you recognize that the person representing the people of the United States, seeking to protect them from criminal predators, they're entitled to a fair shake in court also?

Ms. STRANCH. Yes, sir, I would. I believe that everyone is fair—should have a fair shake and should have an equal opportunity before the courts.

Senator SESSIONS. You know, we've had lawyers that represent business interests and they've been questioned about their fairness. You've represented the AFL-CIO and other labor interests. You will take the oath to do equal justice to the poor and the rich and to be impartial. Will you be able to give the parties before the court a fair hearing, even though you've had a background more from the labor side?

Ms. STRANCH. Yes, Senator, I would. If I will have the privilege of serving, I will do what the law calls me to do, not to be a respecter of anyone, but to be an equal treader of all.

Senator SESSIONS. Thank you. I'm impressed with your record and impressed with the recommendations from your two Senators. I think you'll make a good nominee, from what I know.

Ms. STRANCH. Thank you, sir.

Senator KLOBUCHAR. Thank you very much, Ms. Stranch.

Ms. STRANCH. Thank you.

Senator SESSIONS. Ms. Stranch, I would ask you one thing. We need somebody—the President says, for the nominees to the bench, “We need somebody who's got the heart, the empathy to recognize what it's like to be a young, teenaged mom, the empathy to understand what it's like to be poor or African-American, or gay, or disabled, or old, and

that's the criteria which I'm going to be selecting my judges.''

How does your philosophy—how would you describe your philosophy with regard to empathy and the requirements of objectivity in judging?

Ms. STRANCH. Thank you. I know that's an important concern to people. I can't explain exactly what was the basis of my selection, though I am deeply honored to be selected. I would say to you that I will be objective and fair, and I do recognize that I am bound by existing precedent and by law, and that those are the things that will govern my decisionmaking.

Senator SESSIONS. Thank you.

Thank you, Madam Chairman.

Senator KLOBUCHAR. Thank you very much, Senator Sessions.

But you will make sure you still have some empathy for your husband when he's practicing alone now at the law firm.

[Laughter.]

Ms. STRANCH. Yes, I will. Thank you.

Senator KLOBUCHAR. All right. Good.

RICHARD TARANTO
WEDNESDAY, FEBRUARY 29, 2012
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 1:34 p.m., Room SD-226, Dirksen Senate Office Building, Hon. Al Franken, presiding.

Present: Senators Grassley and Lee.

OPENING STATEMENT OF HON. AL FRANKEN, A U.S. SENATOR
FROM THE STATE OF MINNESOTA

Senator FRANKEN. This hearing will come to order.

I would like to welcome each of you to this hearing of the Senate Judiciary Committee. We will hear from three nominees to the Federal bench: Richard Gary Taranto; Robin Rosenbaum, and Gershwin Drain. These nominees are accomplished lawyers and jurists. They unanimously have received positive reviews from the American Bar Association's Standing Committee on the Federal Judiciary, and have strong support. I am looking forward to hearing from each of them.

Ranking Member Grassley, would you like to give any opening remarks before we turn to our esteemed colleagues, Senator Levin and Senator Nelson, to introduce their nominees?

Senator GRASSLEY. I will say about 2 minutes and then put the rest of the statement in the record.

Senator FRANKEN. Very well.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR
FROM THE STATE OF IOWA

Senator GRASSLEY. I think we ought to realize that we are making real progress on President Obama's judicial nominees. Since convening a couple months ago this second session of the 112th Congress, the Senate has been in session only 18 days, including today. During that time we've held three nomination hearings, receiving testimony from 12 judicial nominees. All in all, more than 85 percent of President Obama's judicial nominees have received a hearing.

We've confirmed 5 nominees in those 18 days. In total, we have confirmed 131 of President Obama's judicial nominees, and that's about 71 percent. We continue to hear concern about judicial vacancy, but I want to emphasize that for more than half of the vacancies, including those designated as judicial emergencies, the president has yet to submit nominations for those positions. So critics need to look at the beginning of the process when commenting on vacancies.

So I welcome all of our nominees today and I'll put the balance of my statement in the record.

Senator FRANKEN. And we will do that, without objection.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Right now, again, I want to thank both Senators for their introductions.

Right now I'd like to introduce the first panel. Our first witness is Mr. Richard Gary Taranto. I'll introduce you once you're seated.

I think, why don't you stand up and be sworn, if that's all right.

So, stay standing.

[Whereupon, the witness was duly sworn.]

Senator FRANKEN. Great. Please have a seat, and thank you. Congratulations.

Mr. Richard Gary Taranto is nominated to serve on the United States Court of Appeals for the Federal Circuit. Mr. Taranto is a partner at the law firm of Farr & Taranto. A graduate of Pomona College and Yale Law School, Mr. Taranto has served as a law clerk to Justice Sandra Day O'Connor and as assistant to the Solicitor General.

Mr. Taranto has extensive experience as an appellate practitioner and has received numerous awards for his advocacy. The American Bar Association's Standing Committee on the Judiciary unanimously gave Mr. Taranto its highest possible rating. Mr. Taranto, congratulations on your nomination. Please feel free to make a statement and to introduce anyone who is with you today. Hit the mike.

Mr. TARANTO. Sorry.

Senator FRANKEN. That's all right.

STATEMENT OF RICHARD GARY TARANTO, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE FEDERAL CIRCUIT

Mr. TARANTO. Well, thank you again, both Senators Franken and Grassley, for having me here today. I want to thank, of course, President Obama for reposing his trust in me for the Federal Circuit, whose work I know well and value highly, and look forward to contributing to, if confirmed.

I do want to introduce a few people who are here with me today: my wife, Vicki Plau and my daughter Nora.

Senator FRANKEN. Welcome.

Mr. TARANTO. Both of them are here. Our other two children are in California and watching, as are my parents also watching, and my sister and brother, and maybe one or both of my two 100-year-old grandmothers.

Senator FRANKEN. Whoa!

Mr. TARANTO. Whoa is right, yes.

[Laughter.]

Senator FRANKEN. Well, all I can say is, just eat right.

[Laughter.]

Mr. TARANTO. I will follow that advice, thank you. Also here today is my long-time partner, Bartow Farr, and our long-time assistant, Julie Mixell, as well as several friends and colleagues.

With that, I would be happy to answer any questions you have.

Senator FRANKEN. Well, first of all, congratulations to your family and to all your friends and colleagues. They must be very proud. Congratulations again to you on your nomination.

You have extensive experience as an appellate advocate. You have argued in most of the Federal Circuit Courts and in the Supreme Court. How will that experience as an advocate assist you as a judge?

Mr. TARANTO. Well, I think it gives me a sense, based on considerable experience, about what the appellate judging process is at its best and where it can go wrong. The mix of careful attention to facts, what parties expect in the way of scrupulous regard for the record, the desirability of clear and workable reasoning, both to explain to the parties why the winner has won and the loser has

lost, and as important, to provide guidance to litigants and private practitioners for what the law is going to be as it applies to them. Senator FRANKEN. Okay. I saw in your bio that you clerked for Sandra Day O'Connor.

Mr. TARANTO. I did.

Senator FRANKEN. What years was that?

Mr. TARANTO. It was her third term on the court, 1983–1984 term.

Senator FRANKEN. Uh-huh. Now, at that point was she as central to sort of the, you know—to where the court was as she turned out to be toward the end of her career there?

Mr. TARANTO. You know, from a law clerk's perspective she was central to our lives. This was, as I say, her third term on the court, so she had two terms under her belt and there were, therefore, many issues that were familiar to her, some that were new, as with any justice developing a long career on the court.

I must say I did not—I think we did not pay kind of attention to something that might be called a swing vote, or as you say being central in the votes. We discussed the cases with her and she decided them, and we assisted her in the reasoning explaining her position.

Senator FRANKEN. Now, was that based on—this is you as a clerk. Was that based on a philosophy of how you should be a clerk or was that just your being oblivious to what was going on historically?

[Laughter.]

Mr. TARANTO. I think it was more the philosophy of being a clerk.

Senator FRANKEN. Oh, good. I'm glad you said that.

[Laughter.]

Senator FRANKEN. Now I'm going to vote for you.

[Laughter.]

Senator FRANKEN. What did you learn from her? I'd really be curious.

What did you learn from that experience from her? I mean, here is one of the iconic justices in the history of the Supreme Court. What did you learn from clerking from her that will inform your performance as a judge?

Mr. TARANTO. Well, I learned, I think, many things but one of them was the energy and concentration she brought to what was then an extraordinarily demanding docket on the Supreme Court. Some 140 cases were being decided each year—each term at that time in the Supreme Court's history.

I learned a lot about the ability to pierce through what can be mountains of paper to identify what is central to the disposition of the case. I learned a lot about the value of writing narrowly in a way that is tied to the facts of the case and not getting ahead of one's self as an institution, leaving different matters that are not then before the court to future cases. All of those were central virtues in my experience to clerking with Justice O'Connor.

Senator FRANKEN. Well, it sounds like that was an enormous privilege to clerk for her. I'm done with my questioning, Senator Grassley, of the witness.

Senator GRASSLEY. I have just two areas that I want to discuss with you, but I have several questions in each area. One of them I hope you've been alerted to that I want to ask you about, the Circuit you're going on and whistleblower protection.

But before I get to whistleblower protection, for several years you were amicus counsel for the American Psychiatric Association.

What was your relationship with the association and what role did you play in crafting arguments on behalf of the association?

Mr. TARANTO. Since 1994, until about a year and a half ago, I was counsel to the committee within the APA that reviews potential opportunities for amicus participation, so I did that for quite a long time. I more or less inherited that position from Joel Klein, who had been the long-term amicus counsel, and indeed general counsel, to the APA.

So my job was to discuss with the committee year in and year out a fairly small number of matters each year that would present issues in the Supreme Court, occasionally in other courts, but almost entirely in the Supreme Court, issues bearing on the interests of psychiatric patients and psychiatrists.

The APA itself, of course, has a governing body which adopts formal position statements and policies, and my job was to help the committee decide whether those policies were affected, or might be affected, by what the court case was about and then to present the APA's position to the Supreme Court, with a very heavy emphasis on accurately representing what the psychiatric and psychological literature said about particular issues.

Senator GRASSLEY. I don't have any problems with the advocacy position that you filled, but I have some questions that I want to know whether it has any impact upon your potential of being on the Federal Circuit.

So I would ask you about being an amicus counsel in the briefs that you would have helped on with Romer and with Lawrence, and I ask you this because there are several challenges to the Defense of Marriage Act and other Federal restrictions on same-sex couples.

Given the Federal Circuit's appellate jurisdiction, such issues may come before you. So considering your past advocacy, do you have any doubts about your ability to be a fair and neutral arbiter should one of these cases come before you?

Mr. TARANTO. I have no doubt whatsoever the role that I played in the matters you mentioned was the role of an advocate representing a client and its formal positions on the matter.

Senator GRASSLEY. Okay. I'd like to ask you if you have any views on the standard of review that should be applied in due process and equal protection challenges to laws making distinctions based on sexual orientation.

Mr. TARANTO. Senator, I don't have a view about that, that it feels appropriate for me to discuss here. My sense has always been that it's very dangerous for a nominee to discuss a legal issue in advance of the adversarial process of adjudicating that issue in the concrete case.

It's unfair to the litigants who might suspect a kind of confirmation or commitment. It risks speaking more broadly than a narrow, case-specific ruling that the court should adopt, and it risks really an ill-considered kind of broad pronouncement when that adversarial process followed by careful study and collaboration are bypassed.

Senator CARPER. Let me move on then, still in the same area. The administration has announced a policy that it would not defend

the Defense of Marriage Act. In justifying its refusal to defend the suit, if there is a suit, the administration has asserted—and I guess there is a suit. The administration has asserted that “classifications based on sexual orientation should be subject to a heightened standard of constitutional scrutiny”.

So I think it’s fair for me to ask you if you’re aware of any Supreme Court precedent that would support the administration’s position that “classification based on sexual orientation are the subject of heightened scrutiny”.

Mr. TARANTO. Senator, I have not studied that question, so sitting right here I can’t say that I’m aware of a precedent one way or the other on that question.

Senator GRASSLEY. Okay. I would like to have you answer, if there is anything further to say, in writing. Since you said you haven’t had a chance to think about it, I guess you’ll have some weeks to think about it.

Mr. TARANTO. I’m happy to answer that, yes.

Senator GRASSLEY. Okay. Do you agree that it would be improper for a District or Circuit Court to apply a level of scrutiny other than the rational basis standard, absent further guidance from the Supreme Court?

Mr. TARANTO. Again——

Senator GRASSLEY. And I think it’s important for me to emphasize, absent further guidance from the Supreme Court.

Mr. TARANTO. Again, I think, as I understood the question, the answer to that question depends on knowing what the current Supreme Court precedents are. That’s the question that I think I don’t really know the answer to.

Senator GRASSLEY. Okay. But you would know whether or not Supreme Court precedent is important in this area.

Mr. TARANTO. Oh, absolutely. Indeed, Supreme Court precedent is not only important in that area, but for a lower Federal court judge is binding as to standards of review, as well as particular substantive rulings, and every lower court judge is bound to follow those standards until the Supreme Court has said otherwise.

Senator GRASSLEY. Yes. I’m going to quote Justices Scalia and Lawrence, “Countless judicial decisions and legislative enactments have relied on the ancient proposition that our governing majority’s belief that certain sexual behavior is immoral and unacceptable constitutes a rational basis for regulation”. So, whether or not you would agree with Justice Scalia that moral disapproval may serve as a rational basis for regulation, and why or why not?

Mr. TARANTO. I do think, Senator, that that’s a question that I feel uncomfortable answering precisely to the extent it might come before me as a judge.

Senator GRASSLEY. Okay. I’ll stop there then. Maybe I’ll follow up with an answer in writing.

In your view, does the Federal Government have authority to determine the eligibility requirement for Federal benefits as it did by defining marriage as between one man and woman in the Defense of Marriage Act? That’s the last question I have in this area.

Mr. TARANTO. I think I need to give the same answer.

Senator GRASSLEY. Okay.

Mr. TARANTO. To the extent it would be possible to come before

me as a judge, I don't think I should——

Senator GRASSLEY. I'll follow up, then.

Mr. TARANTO. Okay. Thank you.

Senator GRASSLEY. On whistleblower protection—and I've been actively involved in whistleblower protection, going to parts of the False Claims Act that I helped write, or the Whistleblower Protection Act that I wrote with Senator Levin, who was here a little while ago, and that was in 1989.

I've always pushed for strong whistleblower protections for Federal employees. Considering that the Federal Circuit has exclusive jurisdiction over these cases, can you describe what experience, if any, you have had with the Whistleblower Protection Act? Before you answer that, I don't have the statistics with me that I used for a former nominee that's going on the same court you are, but there's been very few times—maybe a handful times out of a few hundred cases—where it seems to me like the court you're going on has read our statute.

Well, here it is. Up until February 2011, only 3 out of 219 cases that whistleblowers brought for appeal have whistleblowers won. In 2010, the court was 0 for 9 against whistleblowers. Maybe the whistleblowers weren't right, I don't know, because I don't know what cases. But it just seemed to me like one segment of people just can't lose that many times. There's got to be something wrong. Anyway, let me repeat the question: can you describe what experiences, if any, you have with the Whistleblower Protection Act?

Mr. TARANTO. I have not had any experience under that particular act.

Senator GRASSLEY. Okay. The Federal—well, I guess I'm kind of repeating myself here, but let me do it for the purposes of the question. The Federal Circuit has issued a number of decisions that have substantially limited the types of disclosures that are protected under the Whistleblower Protection Act. Perhaps the most egregious example of the Federal Circuit placing hurdles in front of Federal Government whistleblowers is the 1999 decision in *LaChance v. White*.

In that case the Federal Circuit held that a whistleblower had to present irrefragable proof that wrongdoing actually occurred in order to prove a claim. Have you ever heard of the irrefragable proof standard, and what's your understanding of that standard?

Mr. TARANTO. Well, you know, Senator, I did not hear of it until I did my homework for this hearing and then of course I——

Senator GRASSLEY. Oh, somebody told you I might ask you about this?

Mr. TARANTO. Somebody suggested it was a matter of some concern to you, yes. My brief study of the matter since then has indicated two things. One, that in a 2002 case, subsequent to the *LaChance* case, not in the Whistleblower Protection Act context, the Federal Circuit said really that means clear and convincing evidence, a much more familiar standard in the law that “irrefragable proof”.

I think I also saw a 2004 Whistleblower Protection Act case in which the Federal Circuit said—called *White v. Department of the Air Force*, in which the Federal Circuit said there is no requirement of proving government misconduct by irrefragable proof.

As far as I could tell from my own Westlaw search, that's the last pronouncement under the Whistleblower Protection Act that uses the term "irrefragable", only to reject it. So that's my understanding of where the law is, but as I say that's a fairly casual bit of research.

Senator GRASSLEY. So you think it's more like clear and convincing than anything else at this point? Is that what you're saying?

Mr. TARANTO. The Ampro case is explicit in saying the terminology we have used, sometimes irrefragable proof, sometimes something else, really ought to be treated as the same as clear and convincing evidence.

Senator GRASSLEY. Well, do you happen to believe that whatever that standard is now, irrefragable proof, or a substantial evidence standard should apply to whistleblower cases?

Mr. TARANTO. You know, I——

Senator GRASSLEY. I don't think we require that in the law we wrote.

Mr. TARANTO. No. At this point my understanding of any complexities within the precedents has run out, so I don't know beyond having looked at those two cases I mentioned, which suggests to me that irrefragable proof is not currently being applied under the Whistleblower Protection Act.

Senator GRASSLEY. Well, then I'll ask my staff, but I don't think I should bother to answer—ask these last two questions—should I, in regard to that standard of proof? No. We're OK on that.

I think I'll submit the rest of my questions, including what I've already said I might submit in writing. I have some other questions on judicial philosophy I will submit to you for answer in writing.

Mr. TARANTO. Thank you, Senator.

Senator FRANKEN. And we will hold the record open for a week for questions and answers.

[The questions appear under questions and answers.]

Senator FRANKEN. I'm on the Energy Committee. Irrefragable, I believe, is natural gas deposits that you can't exploit.

[Laughter.]

Senator FRANKEN. Right? Senator Lee is on Energy. I believe we know that.

Senator Lee.

Senator LEE. Thank you, Mr. Chairman.

It's good to see you, Mr. Taranto. Thanks for joining us today.

Mr. TARANTO. Good to see you, Senator.

Senator LEE. I noticed that among your many other impressive qualifications is one that really stands out, that of substitute teacher. I have to know, what did you substitute teach?

Mr. TARANTO. I briefly substitute taught high school mathematics.

Senator LEE. You're a brave man. How did it go?

[Laughter.]

Mr. TARANTO. They didn't ask me to do much, so what they asked me to do, I was able to do.

Senator LEE. Yes. I suppose that's a good thing, given that you're going onto the Federal Circuit. A lot of mathematical issues dealing with claims against the government and patents, so there's a connection there somewhere.

You're someone who has clerked for one Supreme Court justice,

Sandra Day O'Connor, and you clerked for another judge who almost became a Supreme Court justice, Judge Robert Bork. So that leads me to ask, is there any justice that has served over the last 100 years or so who you would say is sort of your judicial mentor, someone that you might pattern your judicial philosophy after?

Mr. TARANTO. If you will allow me to exclude living justices, both for reasons of judiciousness and to——

Senator LEE. That's a good idea, actually. Let's exclude the living.

Mr. TARANTO. And to filter out, of course, my unique relationship with Justice O'Connor. If there was a single justice that I would pick out as having more of the desirable characteristics that I value, it would—than anybody else, though of course these characteristics are widespread, it would probably be the second Justice Harlan, who sat on the court from the mid-1950's until 1970 or 1971, and that's because his opinions reflect just great respect for reason and tradition and precedent, recognition of the dangers, the need to guard against injecting personal preference into legal analysis, the great value of clarity and narrowness of ruling. It seems to me, though I haven't made a systematic study, that he did that at a very high level of consistency for his career.

Senator LEE. Some have commented that John Marshall Harlan, II, was something of a prototextualist or an early modern-day textualist. Would you agree with that assessment, and is that part of why you admire him?

Mr. TARANTO. I always have a little bit of trouble with attaching a label like textualist because most judges, even those who are disagree— or justices, even those who are disagreeing with each other on particular cases, would claim that mantle but give different interpretations to the text.

What I tried to identify in Justice Harlan was the caution and intense focus on giving reasons for everything in interpreting a text and relying very heavily on precedents and reading them with nuance and with great care, great attention to the particular facts that were at issue in the case, and then writing narrowly so as never to rule more broadly than the case demanded.

Senator LEE. Yes. One of the things that I've always admired about that justice was his commitment to the text and his commitment to the notion that the law supplies an answer, and that more often than not the overwhelming majority of the cases you find the answer in the text. There is a competing school of thought that focuses more on intentionalism than textualism. Do you gravitate toward either end of the spectrum when you're dealing with the matter of statutory construction?

Mr. TARANTO. You know, in my role as advocate, which is the role that I have had for my entire practice, as you will understand, what I have gravitated toward was attending to the different perspectives that the justices have had and trying to take account of all of them, to the maximum extent possible, to advance the interests of the particular client.

But I do understand the distinction that you are making between what the text says and how the legal community would have understood that text at the time as opposed to what some individual legislator or framer may have intended to put in the text and didn't.

Senator LEE. And your reaction to that sort of dichotomy is what?

Mr. TARANTO. Well, again, as a lawyer representing a client, the reaction has been if there's a justice on the case who cares one way or the other, one needs to pay careful attention to what one can say to try to persuade that justice. Sometimes, of course, the framer's intent, as reflected in the papers of the Constitutional Convention or the ratification debates, will in fact have a legitimate bearing on what the text was widely understood at the time to mean. Beyond that I don't think that I could tell you that I have a particular settled judicial philosophy, and in any event, as relevant to the job that I'm being considered for, my task would be to follow the Supreme Court's precedent, not only substantive rulings but indeed what the Supreme Court says about methodology.

Senator LEE. Sure. Sure. Although certainly you would agree that the text is the guiding—is the principle guidepost. The text normally is the beginning and the end of the analysis when you are interpreting something, and very often you are interpreting something. If you're sitting on the Federal Circuit, for example, there may not be an established precedent telling you what the official interpretation—what the precedential interpretation is.

Mr. TARANTO. I agree with that completely, particularly for complicated statutes. Congress has written texts that are often complicated, and complicated for very good reasons, to try to do certain things narrowly and not go too far and the text is the authoritative guide to the proper resolution of the case.

Everything else is a matter of trying to understand that text properly, including, of course, precedents that may have already addressed the issue because no judge ought to view a matter as never having been considered by jurists before.

Senator LEE. Well said. I see my time's expired. Thank you, Mr. Chairman. Thank you, Mr. Taranto.

Senator FRANKEN. Thank you, Senator. Well, sir, you'll be excused now. Thank you so much. Congratulations once again.

Mr. TARANTO. Thank you.

Senator FRANKEN. The record will be open for a week, so if any Senators have questions for you we'll get those to you and this will be open for a week.

Mr. TARANTO. Thank you, Senator. And thank you, Senator Grassley.

Senator FRANKEN. Well, thank you both. Thank you, your Honor—both your Honors. I want to again congratulate all of the nominees, including Mr. Taranto. Thanks to each of you for your testimony today.

STEPHANIE THACKER
TUESDAY, OCTOBER 4, 2011
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 3:03 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Richard J. Durbin, presiding.

Present: Senators Durbin, Leahy, Coons, and Lee.

OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Good afternoon. This hearing of the Judiciary Committee will come to order.

Today we will consider five outstanding judicial nominees for the Federal bench: Stephanie Thacker, nominated to serve on the U.S. Court of Appeals for the Fourth Circuit; Ronnie Abrams, nominated to the Southern District of New York; Rudolph Contreras, nominated to the U.S. District Court Judge for the District of Columbia; Miranda Du, nominated to the District of Nevada; and Michael Fitzgerald, nominated to the Central District of California. Each of these nominees has the support of their home State Senators or, in the case of the District of Columbia nominee, the support of D.C. Delegate Eleanor Holmes Norton. I commend President Obama for sending these nominees to the Senate, and I thank my colleague Senator Lee for joining me.

At these hearings it is traditional for nominees to be introduced to the Committee by Senators from their home States, and unless the Ranking Member has opening remarks, which I would invite him to make at this point, I am going to recognize our colleagues. So if you want to stay on their good side, please proceed.

STATEMENT OF HON. MIKE LEE, A U.S. SENATOR FROM THE STATE OF UTAH

Senator LEE. Thank you, Mr. Chairman. I join you in welcoming our nominees before us today.

Yesterday the Senate confirmed six Article III judicial nominees. This included the confirmation of Judge Jennifer Zipps, who will fill the seat held by the late Judge John Roll. The tragic and horrific events that took Judge Roll's life on January 8th of this year shook the judicial community and our Nation. I am pleased that Republicans and Democrats were able to come together to confirm her in an orderly and expeditious manner.

The Senate has confirmed 42 judicial nominees in this Congress alone so far. We have entered into a unanimous consent agreement to vote on four more judges next week. I applaud this progress, which I think demonstrates Ranking Member Grassley's commitment as well as that of the Republican members on this Committee to work with our Democratic colleagues in moving forward with consensus nominees.

Today marks the 15th nominations hearing held in the Judiciary Committee this year at which we have had the opportunity to speak with 65 judicial nominees. In total, 85 percent of President Obama's judicial nominees have received a hearing in this Congress. I think this speaks well both to President Obama's nomination

process and to the ability of this Committee to work together on a bipartisan basis.

Today we will hear, among others, from Stephanie Thacker, who has been nominated by President Obama to the Fourth Circuit. Her hearing comes only 26 days after her nomination. I would note that none of President Bush's circuit court nominees were afforded a hearing that quickly, particularly those to the Fourth Circuit, where we had some issues with delay.

Yesterday marked the confirmation of President Obama's fifth nominee to serve on the Fourth Circuit. In 8 years only four of President Bush's Fourth Circuit nominees were confirmed. I hope my colleagues on the other side of the aisle are aware of the comparatively generous treatment afforded to President Obama's nominees, particularly those for the Fourth Circuit.

I welcome the nominees and their families to this Committee, and I realize that this is a very important day for all of them and look forward to hearing their testimony and responses to our questions. Thank you, Mr. Chairman.

Senator DURBIN. Thank you, Senator Lee. For the record, I believe that Senator Reid has filed cloture on 25 of President Obama's nominees that were on the calendar just a few days ago, but there has been remarkable signs of progress since, and I hope that spirit continues with these nominees and those that are pending. I was going to recognize Senator Reid first, and when he arrives, of course, he will be given precedence. But we will start in seniority, and I recognize my colleague and friend, Senator Jay Rockefeller. PRESENTATION OF STEPHANIE DAWN THACKER, NOMINEE TO BE CIRCUIT JUDGE FOR THE FOURTH CIRCUIT, BY HON. JOHN D. ROCKEFELLER IV, A U.S. SENATOR FROM THE STATE OF WEST VIRGINIA

Senator ROCKEFELLER. Thank you, Senator Durbin and Senator Lee and Chairman Leahy, who was here, and all members of this Committee for having this very important hearing today.

My purpose is that I am deeply honored to put before you and introduce Stephanie Dawn Thacker, one of the finest judicial nominees I have ever known. I pay a lot of attention to this process. I am not a lawyer, but I pay a lot of attention.

She is joined by her husband, John Carr, also an esteemed lawyer; her sister, Samantha Sullivan, a teacher; and her nephew, Wade Sullivan, who has not picked his professional career yet. Not present but I think watching very closely on television in West Virginia and surely beaming with pride is her mother, Katie Thacker, and her father, Rod Young.

Stephanie's family has many reasons to be proud of her, and she of them, and we are all fortunate for their dedication to their country and to Senator Manchin's and my home State.

For myself, I am impressed by Stephanie Thacker's superior intellect, her passion for the law, her unquestioned integrity, and her strong character. Another such person was my very dear friend, Judge M. Blane Michael, who served for more than 17 years in the

very judicial seat on the Fourth Circuit to which Stephanie Thacker has been nominated. Like Judge Michael, Ms. Thacker will be a strong voice on the court, one who follows the law, defies pigeonholing; one who knows how to build consensus, often with a

quick wit; always one who can couple deep legal analysis with an understanding of real-world impact.

Ms. Thacker graduated at the top of her undergraduate and law school classes, spent 12 years as a Federal prosecutor in working for the Department of Justice, fighting the most horrific crimes imaginable, and is now a top lawyer at one of West Virginia's most respected firms.

While at the Department of Justice, Ms. Thacker developed a unique expertise in the investigation and prosecution of child exploitation cases, winning difficult cases, helping to develop policy and initiatives, and as it turns out, training attorneys and law enforcement professionals around this country on that subject, and, indeed, around the world so as to prevent these terrible crimes.

One of her more lasting successes was working with the FBI and the National Center for Missing and Exploited Children to develop a nationwide initiative to combat child sex trafficking. As a result of this program, more than 1,600 children have been rescued, and more than 700 sex offenders have been convicted.

Ms. Thacker's accomplishments have earned her national recognition, including the very prestigious Attorney General's Distinguished Service Award. I have also brought copies of letters of commendation that she has received from Attorney General Gonzales, FBI Director Mueller, Senators Byrd, Chambliss, and Zell Miller, among others.

Ms. Thacker is striking to me for her groundedness. I am not sure if that is a word, but it has meaning to me. It is.

Senator DURBIN. When a Senator says it, it is a word.

Senator ROCKEFELLER. Thank you, Mr. Chairman.

[Laughter.]

Senator ROCKEFELLER. She has never forgotten who she is or where she came from, and she calls upon that life experience every day. It is perhaps Ms. Thacker's upbringing—and I really believe this totally—that drove her to fight for justice every day and created in her an understanding that decisions that she made as a prosecutor and decisions, I hope, that she will make from the bench have a lasting impact on people's lives.

Like so many in our State, Ms. Thacker came from humble beginnings and went on by force of will, by force of intellectual heft, to chart a course of accomplishment for herself, her State, and her country. Stephanie Thacker is without doubt the perfect person for this vacancy on the Fourth Circuit Court of Appeals, and she has my unwavering support.

Senator DURBIN. Thank you, Senator Rockefeller.

I would like to recognize your colleague, Senator Manchin, regarding the same nominee.

PRESENTATION OF STEPHANIE DAWN THACKER, NOMINEE TO BE CIRCUIT JUDGE FOR THE FOURTH CIRCUIT, BY HON. JOE MANCHIN III, A U.S. SENATOR FROM THE STATE OF WEST VIRGINIA

Senator MANCHIN. Thank you, Mr. Chairman, and thank you, Senator Lee, and the Committee for inviting me here today. It is my privilege to join my senior Senator, Senator Rockefeller, in support of the nomination of Stephanie Dawn Thacker, a native of Hamlin, West Virginia, to the Fourth Circuit Court of Appeals.

I would first like to take a moment to recognize her husband, John Carr; her sister, Samantha; and her nephew, Wade. I am pleased that all of you were able to join us today for the very important hearing and also her family watching on television.

Stephanie Thacker's impressive background and extensive list of accomplishments in both the public and private sectors make her an exceptional candidate for the Fourth Circuit. She is renowned in our State for her mastery of the law and of the courtroom, and I have no doubt that she will make a highly successful Federal judge.

Ms. Thacker has dedicated much of her career to fighting some of the most reprehensible offenses, which Senator Rockefeller just mentioned, in our society. As a trial attorney, deputy chief of litigation, and principal deputy chief, she spent several years prosecuting cases on child exploitation and obscenity at the Department of Justice. Her outstanding work and leadership earned her a number of honors at DOJ, including four Meritorious Awards and two Special Achievement Awards. Her impressive performance in prosecuting the case of *United States v. Dwight York* earned her the Attorney General's Distinguished Service Award, one of the Department's highest honors, and she was also a recipient of the Assistant Attorney General's Awards for Special Initiative and Outstanding Victim/Witness Service.

Prior to her service at the Department of Justice, Ms. Thacker worked with the U.S. Attorney's Office for the Southern District of West Virginia where she prosecuted a diversity of criminal cases, including money laundering and fraud. While at the U.S. Attorney's Office, Ms. Thacker also participated on the trial team prosecuting *United States v. Bailey*, the first case ever brought under the Violence Against Women Act.

Since 2006, Ms. Thacker has been a partner at the prestigious law firm of Guthrie & Thomas in Charleston. While at the firm, she has concentrated on cases involving product liability, environmental and toxic torts, complex commercial defense, and criminal defense. Ms. Thacker was a model student in both her undergraduate and legal studies. She earned her Bachelor's degree in business administration magna cum laude from Marshall University and her J.D. Order of the Coif from West Virginia University College of Law. While at WVU, she was the recipient of the Robert L. Griffin Memorial Scholarship and editor of *West Virginia Law Review's* Coal Issue. She has also recently been named Outstanding Female Attorney by WVU Law's Women's Caucus.

I believe that Ms. Thacker's wide-ranging expertise in civil and criminal matters, her impressive track record in the courtroom as both a prosecutor and a defense attorney, and her outstanding academic accomplishments will make her a first-rate addition to the Fourth Circuit. I am proud to call her a fellow West Virginian, and I hope that the Committee will move to confirm her for the vacancy quickly.

Along with Senator Rockefeller, I want to thank the Chairman and members of the Committee. I welcome the opportunity to work with all of you to confirm Ms. Thacker in a timely manner.

Thank you.

Senator DURBIN. Thank you, Senator Manchin and Senator

Rockefeller. You are welcome to stay. I know you have busy schedules. The nominees certainly do appreciate the presence and testimony of each Senator, but if you would like to leave at this moment, you are certainly welcome to. Thank you again for coming to this Judiciary Committee hearing.

We are going to bring the nominees before us, first the nominee for the circuit court, and ask a few questions of them for the record, and these introductions have certainly prepared the Committee to look in a positive way toward the backgrounds of each of the nominees.

As is the custom in the Committee, the first nominee will be the Fourth Circuit nominee, Stephanie Thacker, if she would please come to the witness table.

As is the custom of the Committee, I ask you to please raise your right hand. Do you affirm the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. THACKER. I do.

Senator DURBIN. Thank you. Let the record reflect that the witness answered in the affirmative.

Ms. Thacker, I now give you the floor for an opening statement or introduction of family and friends, whatever you would like to put before the Committee.

STATEMENT OF STEPHANIE DAWN THACKER, NOMINEE TO BE CIRCUIT JUDGE FOR THE FOURTH CIRCUIT

Ms. THACKER. Thank you, Senator Durbin.

First I want to express my appreciation to the President of the United States, President Obama, for nominating me to this important position. I also want to thank Senator Rockefeller for his heartfelt recommendation and Senator Manchin for his strong support. In addition to those members of my family that are here today and those that were recognized by Senator Manchin and Senator Rockefeller, I would also like to acknowledge my brother and sister back in West Virginia: my brother, Dr. Alan Young, and my sister, Stacey Young Issa.

Also, although she passed away several years ago now, I want to specifically recognize today my grandmother, Ruth Thacker, who was and remains an important force in my life, and I know she is with me in spirit today.

Senator, I am truly humbled to sit before you today, and I look forward to answering any questions you may have of me.

Senator DURBIN. Thank you very much.

When you were introduced by Senators Rockefeller and Manchin, they pointed to one of the key developments in your legal career, and that was your work in the Justice Department's Innocence Lost Initiative which targeted those who exploited children and provided support services for the child victims. Can you give this Committee a little insight into the work that you put into this initiative and how it came from your practice of the law?

Ms. THACKER. That initiative was a part of my work with the Department of Justice, Child Exploitation and Obscenity Section.

That section is tasked with pursuing crimes against children, exploitation, and obscenity.

At the time sex trafficking was an emerging and important issue that needed to be addressed. I worked together with the FBI's

Crimes Against Children Unit as well as the National Center for Missing and Exploited Children to develop a nationwide initiative that would provide training, support services for victims, and also increase awareness of the issue and implement prosecutions and convictions through working groups around the country. And I understand there are now 43 working groups in the country today, and as the Senators mentioned, there have been over 700 convictions to date since it was implemented in June of 2003.

Thank you for your question.

Senator DURBIN. It is certainly good work, and it certainly speaks to your role as a prosecutor that developed into a special effort to help victims.

I would like to then move to a different part of your legal background, and that is your work in private practice where you took a slightly different role, and I would like you, if you could, to tell the Committee a little bit about the case involving Dupont, involving your class action medical monitoring case in West Virginia. It was brought on behalf of plaintiffs who alleged that they were exposed to arsenic, cadmium, and lead from Dupont's zinc smelting plant. You represented Dupont, I believe, in that action, and I would like for you to tell me how that case was tried, appealed, and the ultimate outcome.

Ms. THACKER. Thank you, Senator Durbin, for that question. Yes, I and my colleagues represented Dupont in a class action lawsuit in West Virginia that was one of the first of its kind there.

First, with respect to your question about my role in the case, I want to state first and foremost that I understand clearly the distinction between my role as an advocate currently and the role of a judge in which impartiality is critical. I recognize that.

With respect to the Dupont case, that case went to trial and resulted in a jury verdict against Dupont. The case was appealed to the West Virginia Supreme Court of Appeals, which did two things: They reduced the damages verdict with respect to the medical monitoring punitive damages, given that there was no present personal injury alleged or proven.

They also provided a remittitur of the punitive damages due to Dupont's remediation of the site in issue. And they remanded the case back for retrial on the issue of Dupont's statute of limitations defense.

The decision of the West Virginia Supreme Court put the case then in a position where the parties were able to resolve the case prior to retrial and were able to achieve settlement.

Currently I serve as part of a three-person finance Committee together with the claims administrator and class counsel for the plaintiffs in that case, helping to carry out the settlement, which does include remediation and medical monitoring. And I am glad to be a part of that resolution and moving forward with the community in the spirit of reconciliation on behalf of the client.

Senator DURBIN. I am glad you made the point right near the end about the continued medical monitoring, which I thought was an interesting aspect of that case.

You also have the distinction of prosecuting the first case in the country under the Violence Against Women Act. That must have been a daunting undertaking since you were the first. Can you tell

us what led you to the decision to try that case or to prosecute that case?

Ms. THACKER. Well, thank you, Senator Durbin, for the opportunity to address that case. Certainly I did not do it alone, so while it was daunting being the first case, I was part of a team of prosecutors. The Violence Against Women Act had been passed in October, I believe, of 1994, and this case, the assault on the victim in the case, occurred in November 1994. Our U.S. Attorney at the time, and now my law partner, had been to a U.S. Attorneys conference in which that statute was discussed, so she recognized that the Violence Against Women Act may apply here. That case proceeded to trial, and the jury convicted the defendant and he was sentenced to life imprisonment. He was also charged with kidnapping, which provided a statutory maximum of life in prison.

A little bit about the facts underlying that life imprisonment——
Senator DURBIN. If I might, since I have gone over a bit in time.

Ms. THACKER. Certainly.

Senator DURBIN. I was particularly interested as to whether there was a challenge to the constitutionality of the law brought in that first case.

Ms. THACKER. There was a challenge to the Bailey case that was affirmed by the Fourth Circuit. The Violence Against Women Act, the criminal provisions in that part of the Violence Against Women Act specifically include a jurisdictional nexus; that is, there must be some crossing of State lines. And so contrary to or different from the Morrison section of the Violence Against Women Act that the Supreme Court held unconstitutional, the criminal provisions include enumerated jurisdictional elements.

Senator DURBIN. Thank you very much.

Ms. THACKER. Thank you.

Senator DURBIN. Senator Lee.

Senator LEE. Thank you, Mr. Chairman, and thank you, Ms. Thacker, for joining us. I welcome you and your family to the Committee. You published a Law Review article years ago in the West Virginia Law Review in which you advocate a fairly aggressive view of vicarious liability for churches and priests, under which churches and priests would be held liable for the improper actions of other priests within the same church.

Based on that article, I feel the need to ask: Do you disagree with laws or the need for laws and legal doctrines that offer special protections to religious institutions?

Ms. THACKER. I do not disagree with that.

Senator LEE. OK. One of the reasons I asked that is that in that article you refer to at one point—you suggest that many charitable organizations, including religious institutions, are “big business.” Tell me what you meant by that and whether that means that charitable organizations, including religious institutions, should not be—whether that means they should not be offered some kind of special protections?

Ms. THACKER. Thank you, Senator Lee. I appreciate the opportunity to address that issue. The Law Review article was meant to address the emerging and novel legal issues at the time rather than to aggressively advocate. The term “big business” in the Law Review article was actually in reference to another article or case

that I was citing for a particular principle in that. I don't recall what, but that was not my view but, rather, something I was referencing. And I certainly would recognize, were I fortunate enough to be confirmed to the Fourth Circuit Court of Appeals, the constitutional protections and would follow the law of the United States Supreme Court and the Constitution.

Senator LEE. OK. In that same article, you noted a case in which a court did not hold a bishop liable for the actions of one of his fellow clergy members because the non-offending bishop did not participate in or ratify or approve of the conduct. And you argue in that article, with disapproval, I think, that the result of the court's decision is that "heads of religious societies are not expected to be their brother's keeper."

So do you view the law as mandating a certain code of ecclesiastical conduct?

Ms. THACKER. I do not. My goal in that article was merely to assess the state of the law at that time on respondent superior and employer liability, and each of those cases, including the one you mentioned, turn of the specific facts, and I would, if such cases would come before me, review them on a case-by-case basis with a view toward controlling legal precedent. I was merely attempting to set forth the state of the law at the time.

Senator LEE. OK, and not to make a normative judgment as to the state of the law or what it should require.

Ms. THACKER. Absolutely not.

Senator LEE. So if I got that impression, that was not consistent with your intentions.

Now, in the conclusion of the article, you state that due to the "reprehensible factual situations involved in most of the sexual molestation cases," you easily reached the conclusion that, "The church should be thy priest's keeper in terms of civil liability." That does sound like a normative statement to me, a normative judgment of sorts. Tell us what you meant by that.

Ms. THACKER. Well, the goal of the Law Review article, which I wrote as a law student 22 years ago, was simply to make a statement or a review of the areas of the law and to address how that may evolve, a sort of best guesstimate as to how that may evolve. Frankly, I have not looked at the state of the law in that area since, but I would follow the law and controlling legal precedent, depending on the facts of the cases that came before me. I certainly did not intend to make any overarching statement in that Law Review article.

Senator LEE. And you did not intend to make any statement to the effect that the legal standard to be applied when evaluating the liability vel non of a religious institution might be determined or influenced or altered in any way by the nature of the factual situation before it?

Ms. THACKER. Absolutely no, Senator.

Senator LEE. OK. Thank you.

Senator DURBIN. Thank you, Senator Lee.

I have no further questions to ask of this nominee. I thank you very much for being with us today. There may be additional questions sent to you by some other members of the Committee, and I hope you can answer them in a timely fashion, and we look forward

to working with you after this hearing.

Thank you again for joining us.

Ms. THACKER. Thank you.

O. ROGERIEE THOMPSON
TUESDAY, DECEMBER 1, 2009
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, Pursuant to notice, at 10:01 a.m., Room 226,
Dirksen Senate Office Building, Hon. Sheldon Whitehouse presiding.
Present: Senator Franken.

PRESENTATION OF O. ROGERIEE THOMPSON, NOMINEE TO BE
U.S. CIRCUIT JUDGE FOR THE FIRST CIRCUIT BY HON. SHELDON
WHITEHOUSE, A U.S. SENATOR FROM THE STATE OF
RHODE ISLAND

Senator WHITEHOUSE. The hearing will come to order.

Today we will consider President Obama's nomination of O.
Rogeriee Thompson to the United States Court of Appeals for the
First Circuit. I am very grateful to the Chairman of the Senate Judiciary
Committee, Chairman Leahy, for the opportunity to chair

this particular hearing, and I do so with great pleasure since the
nominee is a distinguished Rhode Island judge, and a friend of
many years' duration. I welcome Justice Thompson and her family
and friends to the Judiciary Committee and to the U.S. Senate.

In particular, I want to welcome her husband Bill who is here,
and her daughters Reza and Sarah. Their son is away in Spain but
is here in spirit. And also, her brother-in-law, Ed Clifton, who is
another distinguished jurist, along with her husband Bill. It's quite
a judicial family in Rhode Island. Ed Clifton. It's wonderful to have
you here, Your Honor.

Clifford Monteiro is here, who is a distinguished leader in the
NAACP and had a very long and distinguished career in law enforcement
in Rhode Island. I also want to welcome and have the
record reflect the presence of Congresswoman Christensen, who
has come from the House of Representatives to be here for her
friend and this family today. I am very pleased, Congresswoman,
that you could be here.

I particularly welcome to the Committee the senior Senator from
Rhode Island, Jack Reed, who will introduce Justice Thompson at
the conclusion of my brief opening statement.

It has been a great honor to serve with Senator Reed in the Senate,
and it has been a pleasure. He showed great courtesy in allowing me to assist him in identifying the best possible
nominee to

serve on the First Circuit, which serves our home State of Rhode
Island. I was proud to join him in recommending Justice Thompson
to President Obama, and I thank the President for recognizing her
expertise and good judgment.

Justice Thompson comes before the Committee with an exceptional
record of achievement that speaks both to her remarkable
talents and her lifetime of hard work. Born in segregated South
Carolina, Justice Thompson pursued the opportunity to finish high
school in Scarsdale, New York, even though it meant moving away
from her family at an early age.

After excelling there, Justice Thompson went on to graduate
from Rhode Island's Brown University and to receive a law degree
from Boston University. With those academic credentials, one

might have expected Justice Thompson to pursue a lucrative career in the corporate realm, but she instead chose to employ her talents in under-served communities in Providence. I am very glad that she did.

A successful career in legal practice led to Justice Thompson's appointment as an Associate Judge on the Rhode Island District Court, and subsequently as an Associate Justice on the Rhode Island Superior Court. Justice Thompson now has 21 years of judicial experience and a record of respect from all corners of Rhode Island's bench and bar. Her courtroom, deservedly, has come to be known as a place in which every party can expect a fair hearing. Justice Thompson's extensive experience on the Rhode Island bench prepares her well for the work of the First Circuit. Not only has it allowed her to consider the customary range of Federal issues that State courts regularly face, but it has allowed Justice Thompson to demonstrate the proper role of a judge: to respect the role of the legislature; to decide cases based on the law and the facts; to not prejudge any case, but listen to every party that comes before them; to respect precedent; and to limit themselves to the issues that the court must decide.

But Justice Thompson not only is an exceptionally qualified nominee, she also is an historic nominee, as she would be the first African-American, and only the second woman, ever to serve on the First Circuit Court of Appeals. Indeed, Justice Thompson has a habit of breaking barriers, as she was the first African-American woman appointed to Rhode Island's District Court and to Rhode Island's Superior Court. It is fitting that she should be the one to make another piece of long-overdue history. She is a worthy nominee for this historic occasion.

I look forward to working with Chairman Leahy and my colleagues as this nomination proceeds through the Committee, and ultimately to confirmation.

I see that Senator Franken has joined us. I would customarily yield to the Ranking Member, but there is no Ranking Member present. Should a member of the Minority party come, I will be delighted to accept their opening statement. If no one does, the record of this proceeding stays open for a week so that statements and questions for the record might be included.

But before we turn to Senator Reed, let me ask my distinguished colleague from Minnesota if he wishes to make an opening statement at this juncture.

Senator Franken.

Senator FRANKEN. No, not at this juncture. But I'd love to hear from the senior Senator from your State, and what he has to say about our nominee.

Senator WHITEHOUSE. And without further ado, Senator Reed, the floor is yours.

PRESENTATION OF O. ROGERIEE THOMPSON, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE FIRST CIRCUIT BY HON. JACK REED, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND
Senator REED. Thank you very much, Mr. Chairman. Thank you, Senator Franken. Mr. Chairman, thank you for your kind words, but also for your advice in this collaborative effort to identify for the President worthy and suitable nominees for our courts in

Rhode Island. I am pleased and proud today to be here to introduce Associate Justice Rogeriee Thompson, the nominee for Rhode Island's traditional seat on the United States Court of Appeals for the First Circuit.

We are joined, as you've indicated, Mr. Chairman, by a very strong family contingent: Judge Thompson's husband Bill, their daughters Reza and Sarah. As you indicated, their son Will is in Madrid, studying. We're also honored to have Ed Clifton and Audrey Clifton. This is a dynamic group of lawyers, attorneys, and public services in the State of Rhode Island. It's a remarkable family, and I'm so pleased they're here.

We're also joined by Chief Judge Eric Washington of the DC Court of Appeals. Thank you, Judge, for coming.

I also want to recognize Cliff Monteiro, who has been an advocate and someone whose advice and assistance we both treasure immensely.

We are here today because we have identified a woman with the integrity, the professionalism, and the experience necessary to serve our country as an appellate judge with great distinction. Serving as an appellate judge is a unique opportunity, and this lifetime appointment should be for those who have demonstrated they have the intellectual gifts, the experience, the judgment, maturity, and temperament to take on this special role. Judge Thompson has all of these attributes.

Senator Whitehouse and I did not reach our conclusion without great thought and review; indeed, we encouraged all interested and qualified attorneys in our State to apply. We interviewed 30 candidates for our State's judicial vacancies. We reviewed their education, analyzed their professional experience. We examined what motivated their choices in life and their views about the role of the law. We thought long and hard about their involvement in our community and what we personally knew of each applicant. After these deliberations, we came to the conclusion that Judge Thompson was uniquely qualified to serve on the First Circuit.

In an era when some judges have little experience in courtrooms, Judge Thompson has over 20 years of service on the bench. She has convicted criminals, mediated contractual disputes, overseen complex commercial cases, and dealt fairly and firmly with those in her courtroom—and I must emphasize “fairly”, which is one of the hallmarks of a good judge.

Justice Thompson's reputation for impartiality and character in our State is obvious and uncontroverted. She has been nominated by two Republican Governors, first to serve on the District Court in 1988, and then to serve on our Superior Court in 1997. In both instances, those nominations were overwhelmingly confirmed by our General Assembly.

Justice Thompson's background embodies the classic American success story of intelligence and hard work and faith. Indeed, Justice Thompson was born in South Carolina when segregation still ruled. She went from those humble beginnings to attend Brown University, and then to Boston University Law School, where she excelled. She then chose public service as a staff attorney for our legal aid system. Later, Justice Thompson was an Assistant City Solicitor in Providence, was in private practice, and developed an

expertise in Native American law that took her across the country. Yet what really makes Justice Thompson unique is her decency and deep involvement in our community. She has aided numerous charities and supported countless nonprofit organizations. She has supported higher education by serving as a trustee of Brown University and Bryant University. She has answered the call of a Federal/State jurist as Rhode Island's courts grappled with the issue of non-English speaking litigants. She was critical in helping to resolve that very critical issue.

And I have come to know her and respect her through our shared support and involvement in Dorcas' Place, an adult literacy program, and also her involvement in our largest environmental organization, Save the Bay, and her involvement in Rhode Island's College Crusade, an initiative that encourages talented young people to stay in school and graduate from college, regardless of their circumstances. She has done all of this with integrity and humility.

At the same time, she and her husband Bill, who is a District judge in Rhode Island, have raised a wonderful family in my hometown of Cranston. Indeed, their daughters, Reza and Sarah, are here today, as indicated, and as I said previously, Will is here in spirit, urging his mother on.

Justice Thompson's confirmation to the First Circuit is important to me. She is someone I know and respect. She has earned the trust of Rhode Island's legal community through her demeanor, through her thoughtfulness, and through her respect and regard not only for the law, but for those who come before her court. Last, she has the real-world experience in the State courts which will aid in her deliberations on the First Circuit. I urge you to ask her questions. She will respond with the preparation and intellectual skills she has demonstrated throughout her career. At the conclusion, I would respectfully ask that you send her nomination to the full Senate for confirmation.

Thank you, Mr. Chairman.

Senator WHITEHOUSE. Thank you, Senator Reed. I am very grateful that you took the trouble to be here today. As we know in this body, the health care debate began in earnest yesterday after years—some would say decades—of waiting. As a member of the important Health, Education, Labor and Pensions Committee, I know you have many important responsibilities, both in that debate and in your busy office.

So I appreciate very much that you've taken the time to be here, and I would now call forward the nominee to be sworn and to take her seat.

[Whereupon, the nominee was duly sworn.]

Senator WHITEHOUSE. Thank you. Please be seated.

Welcome. I understand that you do not have a prepared opening statement?

STATEMENT OF O. ROGERIEE THOMPSON, NOMINEE TO BE UNITED STATES CIRCUIT JUDGE FOR THE FIRST CIRCUIT

Justice THOMPSON. Senator, I do not have a prepared opening statement, but I would like to take an opportunity to, first of all, thank President Obama for nominating me, and to also thank you and Senator Reed for forwarding my name to the President for consideration. I have been honored today to have a lot of my family present to

support me and to show me their love, and I would just like to once again acknowledge them personally.

My sister is very enthusiastic about today, so I have lots of relatives who are here who live in the DC area, and I really appreciate them being here to support me. First, I would like to thank my husband, William Clifton, who is an Associate Judge of the Rhode Island District Court, for putting up with me all of these years.

I would like to thank my daughter, Reza Clifton, for being here, my daughter Sarah Clifton, who is sacrificing her own swearing in today. She just recently passed the California bar exam, and today was her swearing in date, but she's here to support her mother and I'm most grateful for her presence.

Senator WHITEHOUSE. Well, we congratulate her.

Justice THOMPSON. Son Will, who is watching it by the webcast. So, hello, William. Have fun.

My sister, LaVonne Thompson, who is an Assistant U.S. Attorney General in the Virgin Islands, and she's flown here from the Virgin Islands to be with me. My brother-in-law, Edward Clifton, who is my colleague on the Superior Court bench, and his wonderful wife Audrey. My cousin, Eric Washington, who is the Chief Judge of the DC Court of Appeals, and his wife Cheryl. I think my niece has gotten here, Camille Clifton, whose father is retired State Department. She is the ambassador, because he is now living in Germany, and their daughter, Sophey Howery.

My cousin, David Bedenbaugh and his son Daniel are also here with me today. Daniel attends the Excel Academy in Riverdale, Maryland. His class has made my nomination a class project in Civics, so I hope they are getting a lot out of the proceedings.

Also present here today: my cousin Jannine Henderson, Janell Jordan, Daniel Womack, Jr., Judy Rogers, Kurt Bedenbaugh, Renee Brown, Tony Graham, Valery Gladney, and I want to thank my dear friend, Cliff Monteiro, for flying down today to be here with me. Another old friend just tapped me on the shoulder, Tom Baker, who is in the DC area. Attorney Baker is a former U.S. Ambassador to Zimbabwe. So, thank all of you for being here today.

Senator WHITEHOUSE. Well, we are very grateful to have such a distinguished and illustrious group of friends and family whose service to the State and Federal bench, to the U.S. Department of Justice, to the U.S. Department of State, and in other places, I think, does great credit to the nominee.

The question that I would ask—and I think it will help fill out the record—is: Justice Thompson, you have spent your career in the State courts of Rhode Island. You are going to go onto an appellate court in the Federal system. Can you explain the circumstances in which, during the course of your career, you have had to review questions of Federal law or U.S. constitutional law in your role as a State court judge, and how that has prepared a foundation for you to deal with the Federal law and U.S. constitutional law questions that the First Circuit will consider?

Justice THOMPSON. Well, Senator, as you are aware, the Rhode Island State courts have concurrent jurisdiction over Federal issues, and as such if Federal issues are presented to our courts, we don't have the luxury of saying, no, I don't want to hear that

because I'm not a Federal court judge. Those issues routinely come before the court, particularly in areas of criminal proceedings where we are called upon to rule upon criminal procedure issues and substantive criminal issues involving search and seizure, confrontation, rights of defendants, right to counsel, selection of jury issues, and many other issues which routinely come up in criminal law cases.

In addition to that, there are Federal issues that come before the court on the civil side of the calendar. In addition to that, Senator, as you know, when State law is unclear about a particular area, we are directed to look to the Federal courts for guidance when they have laws that are similar to our State statutes. And so in the context of my 21-year career, I have been called upon to review Federal issues and to make decisions on those issues.

Senator WHITEHOUSE. You are confident that Federal law would not be unfamiliar territory to you as a judge of the United States Court of Appeals for the First Circuit?

Justice THOMPSON. Federal law would not be foreign to me, Senator. But in addition to that, let me just say generally it is not unusual for new issues—new legal issues, new legal State issues—to come before the courts, the State courts on a daily basis. Once again, we don't have the luxury of saying, "I never sat on a case like that before, so go away". Indeed, the proper methodology for attacking new cases and new areas of law is to delve into the research to get a firm appreciation and understanding of that new and different law and to study the cases, study the precedent, and make a judgment as to how to apply that new law to the facts.

Senator WHITEHOUSE. Well, I thank you.

As I reflected on this question before the hearing, I recalled my 6 years in the Rhode Island Department of Attorney General as a staff attorney in the State Attorney General's Office. My recollection is that when I was involved in civil matters in the Superior Court, it was actually almost unusual for there to be a State law claim that I was involved in because the Federal law and the issues that I was addressing, particularly in civil matters, tended to be the cause of action that plaintiffs were pursuing against the State. So at least in my experience, I can concur with you that, as a State official, one is deeply, deeply imbued in the Federal law, and appreciate your comments in that regard.

I will turn, now, to my distinguished colleague from Minnesota, Senator Al Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

Welcome, Justice Thompson. Congratulations on your nomination.

Justice THOMPSON. Thank you, Senator.

Senator FRANKEN. I was interested to see that you were tribal counsel to the Narragansett Indian tribe. I am on the Indian Affairs Committee here in the Senate, and I was interested that you described that position as "the most challenging and stimulating legal work" you have done as a practicing attorney. Can you tell us more about that work and how it's shaped your work as a judge?

Justice THOMPSON. Senator, when I was asked by the Narragansett Indian tribe to be their tribal counsel, I bravely said yes, but said yes at a point when I had very little information, knowledge, or background about tribal law. As a result of saying yes, I spent

a full 2 weeks delving into Indian law, reading every single thing I could find, until I had a firm grasp of the myriad of issues that tribal governments deal with in our country.

I represented the Narragansetts on every aspect of their sovereignty issues. I represented them in negotiations with BIA, with negotiations with the State over land issues, with negotiations with the State involving Indian artifacts. Issues also arose involving the Indian Child Welfare Act. I was the first person to give information to our family court that there was such a thing as the Indian Child Welfare Act and gave them instruction as to how that act impacted the proceedings of the State family court. That is just a few of the areas in which I represented them.

My experience with the tribe gave me a rich appreciation of the history of the Native people of this country, and I have continued to enjoy a friendship with the members of the tribe and have a great deal of respect for the work that they try to do on behalf of their people.

Senator FRANKEN. Thank you.

Normally we do have members of the Minority party here, and actually they're very good about showing up for these things, especially the Ranking Member. Normally—I was given this in sort of my briefing about this hearing, was that Justice Thompson is likely to be questioned about comments she made on the importance of diversity.

Since the Minority party isn't here, if they were, they would ask you about that. That would be upsetting to them. Not terribly, but they would be concerned that when you put on your robes, that you will just be a judge. So I just want to give you a chance to answer the question that they would have asked. I think diversity on the court is a great idea. But would it be fair to say that when you put on your robes, that you'll judge based on the law?

Justice THOMPSON. Senator Franken, thank you for the question. It would certainly be incumbent upon me as a Federal judge, just as it is incumbent on me as a State court judge, to view every single person who comes before the court with the utmost respect and afford them the utmost dignity. My job is to make sure that I don't have preconceived notions about persons or to come to any kind of proceeding with any kind of bias or prejudice toward any person. My job is to make sure that I examine the facts of a particular case without bias or prejudice, apply the law to those facts, and try to afford the litigants the justice which they deserve.

Senator FRANKEN. Well, I think it's a great answer to a very good question, which I wanted to have represented here, because it wasn't when it normally would be.

Thank you very much. Once again, congratulations to you and your entire family.

Justice THOMPSON. Thank you.

Senator WHITEHOUSE. Well, without further ado, I think we can conclude these proceedings. I take it as a positive sign that our colleagues are sufficiently satisfied with your reputation and qualifications that they have not felt the need to come here and explore any areas of concern that they might have had. I hope that the smooth sailing and passage that you've had through this hearing continues on the floor, and that we are able to move expeditiously

on your nomination on the Senate floor.

I note that Chairman Leahy has taken a keen interest in this particular nomination. He has a statement in support that he has filed that, without objection, I will add to the record of these proceedings. [The prepared statement of Chairman Leahy appears as a submission for the record.]

Senator WHITEHOUSE. I am sure, at the first opportunity that he finds, he will try to obtain either unanimous consent for your nomination to proceed, or a vote on it if that turns out to be necessary. It may seem a bit disappointing that there is not more action here today.

Justice THOMPSON. No.

Senator WHITEHOUSE. But trust me, it is a good thing.

Justice THOMPSON. I am not disappointed, Senator.

[Laughter.]

Senator WHITEHOUSE. I will close the hearing by relating that the record of the hearing will stay open for an additional week for any statements or questions for the record that my colleagues seek to add into the record, or frankly, any other materials that they seek to add into the record.

Justice Thompson.

Justice THOMPSON. One other person I forgot—I didn't know she was coming, but she is here—is my cousin, Whitney Washington, who also just passed the California bar exam. So, she's probably missing her swearing in also.

[Laughter.]

Senator WHITEHOUSE. Well, as I said, it's a very impressive group and I'm glad you made sure that everybody was mentioned. I am proud of you.

Justice THOMPSON. Thank you, Senator.

Senator WHITEHOUSE. I am delighted for you. Senator Reed and I both look forward to working hard to make sure that your nomination proceeds forward, and we are delighted at the way things have turned out so far.

So without further ado, the hearing is adjourned.

[Whereupon, at 10:31 a.m. the Committee was adjourned.]

[The biographical information follows.]

THOMAS VANASKIE
WEDNESDAY, NOVEMBER 4, 2009
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2 p.m., Room SD-226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Kohl, Feingold, Specter, Franken, Sessions, and Coburn.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good afternoon. As always happens in the Senate, there are a half a dozen hearings going on, so you may see Senators drifting in and out.

We will hear from five of President Obama's well-qualified nominees, four for lifetime appointments on the Federal bench and one for an important position in the executive branch.

Judge Thomas Vanaskie from Senator Specter's home State of Pennsylvania has been nominated to a seat on the Third Circuit, having served for more than 15 years in the Middle District of Pennsylvania. Senator Specter and Senator Casey will introduce Judge Vanaskie to the Committee.

I would hope that each would be treated well by the Committee and receive the prompt consideration these nominations deserve.

We have tried to hear nominations in regular order, and I think that we will continue to do so. I wish the Senate as a whole would be able to do that. We do know that Senate Republicans began this year threatening to filibuster every judicial nominee of the new President.

I've been here 35 years. I've never heard that done by either party, for a President of either party. Back through history, I never found an incidence of that. Apparently the only time such a threat has ever been made has been against President Obama's nominees, and I think it's unfortunate. It's even more unfortunate they followed through on that threat by obstructing and stalling the process, delaying for months the confirmation of well-qualified consensus nominees.

Last week, the Senate was finally allowed to consider the nomination of Judge Irene Berger, who had been slowed up by the other side. She's now been confirmed as the first African-American Federal judge in the history of West Virginia. We had to fight for 3 weeks while it was being stalled after her nomination had been endorsed unanimously by the Judiciary Committee.

Incidentally, after blocking it, when we finally were able to force an actual roll call vote where people could not block it anonymously but actually had to vote, she was confirmed 97 to nothing. There's been no answer to why they have subjected this qualified nominee to weeks of unnecessary delay.

Why did it take 3 weeks and 2 hours to debate for the Senate to consider the nomination of Roberto Longe to the District of South Dakota after his nomination was reported unanimously. And when we finally were allowed to vote and people could not use

anonymous holds back, so you had to stand up and either vote “aye” or “no”, it voted 100 to zero for him.

I wonder why the Senate has confirmed only a single Circuit Court nomination, when there are five, stalled by Republicans on the Senate executive calendar, including two that have been pending since June. It is November 4th. By this date, in President George Bush’s first year in office, the Senate, controlled by Democrats, confirmed a total of 12 lower court judges, including four Circuit Court judges. I know, because that July I began serving as Chairman of the Committee, and in 17 months confirmed 100 of President Bush’s nominees.

We did that in spite of the attacks of September 11th, despite the anthrax-laced letters sent to the Senate that closed our offices, one directed to me which killed at least two people, and while working virtually around the clock on the PATRIOT Act for 6 weeks.

But unlike the speedy way that the Democrats confirmed President Bush’s nominees, the Republican Minority has only allowed action on four judicial nominees to the Federal Circuit and District Court.

We reduced judicial vacancies as low as 34 last year, even though it was the last year of President Bush’s second term, and of course could not be re-elected. Now those vacancies have doubled. There are 96 vacancies in our Federal Circuits and District Courts, and 23 more have been announced, approaching record levels.

The American people expect more of the conscience of the Nation from the U.S. Senate. We now have held hearings for 19 of President Obama’s nominees for District and Circuit Court vacancies.

We’ve reported 14 of these nominations favorably. With the cooperation of Senator Sessions, we can continue the progress we’re making on this Committee. We should not be delayed then for months because of anonymous holds, especially when people have to actually step forward and no longer hide because anonymity and they then vote for the people they’ve held up.

Senator Sessions, did you wish to——

Senator SESSIONS. Well, I don’t really wish to get in a tit-for-tat over the confirmations, but I would note that there are 98 vacancies, according to our calculations, and only 22 nominations. Some of those are going through background checks or review and I am sure we will move them forward. I would expect I will vote for well over 90 percent of these nominees, as I did for President Clinton.

I think we’ll move forward with them. We’ve got a nominee I think the Majority is holding up—I don’t know why—Beverly Martin. I just happened to learn the other day, that one’s been sitting, ready to be voted on. We ought to do that now.

I would say that there are a few nominees that are going to be controversial and we’re going to have a lot of debate about, but most—I agree with you, Mr. Chairman, if we get them nominated, then we’ll evaluate them and the good ones we’ll move forward, and the non-controversial ones will.

I look forward to this hearing, and maybe we can move some more, and one I know is a good one and I intend to support.

Chairman LEAHY. Well, let me—we’re going to have introductions, and I’m going to do this the usual way, by seniority. I will introduce Judge Reiss and Ms. Espinel. Senator Specter will introduce

Thomas Vanaskie. Senator Kohl will introduce Louis Butler, followed by Senator Feingold, followed by Senator Sessions for Abdul Kallon, and then followed by Senator Casey for Thomas Vanaskie.

I will now yield to Senator Specter to introduce Thomas I. Vanaskie to be a Judge in the U.S. Court of Appeals for the Third Circuit.

PRESENTATION OF THOMAS I. VANASKIE, NOMINEE TO BE A JUDGE IN THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT BY HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Mr. Chairman. I join my distinguished colleague, Senator Casey, in presenting to this Judiciary Committee the nomination of Judge Thomas Vanaskie to be a Judge of the Court of Appeals for the Third Circuit.

In January of 1994, I had the pleasure of presenting then-citizen Tom Vanaskie to the Judiciary Committee and he was confirmed. He has had 15 illustrious years on the U.S. District Court for the Middle District. He has excelled there. I have watched his progress and have been proud to have been a part of his recommendation to the President, President Clinton, and join Senator Casey in recommending Judge Vanaskie for the Court of Appeals for the Third Circuit.

He brought to the bench and outstanding academic and professional record: a Bachelor of Arts degree, cum laude, from Lycoming College; J.D. from Dickinson School of Law, magna cum laude; was on The Law Review editorial staff; and has been recommended by the American Bar Association unanimously as being Well-Qualified. There is a great deal that could be said about Judge Vanaskie, but I think his record speaks for itself. *Racip salupiter*. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

PRESENTATION OF THOMAS I. VANASKIE, NOMINEE TO BE A JUDGE IN THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT BY HON. ROBERT P. CASEY, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator CASEY. Mr. Chairman, thank you very much. I want to commend your work as Chairman of this Committee. I am honored to appear here. I want to especially thank Ranking Member Sessions for letting me jump the line. It doesn't happen too often in the Senate, and we're grateful.

And to the other members of the Committee, my distinguished colleagues, and of course my colleague from Pennsylvania, Senator Specter, we're honored to be with him today.

I'm also grateful for the nomination of Judge Vanaskie made by President Obama. We're grateful for that nomination. Senator Specter gave a good summation of Judge Vanaskie's academic record, as well as his experience. I'll just add a few words to that. Tom Vanaskie is someone I've known a long time. He's a son of the coal country of Northeastern Pennsylvania, a place where many of us have been exposed to what I would say was a history and a heritage of hard work and sacrifice. In Tom's case, growing up in a region like that, he dedicated himself at a very young age to that hard work and sacrifice that I spoke of earlier.

His academic record is beyond stellar, a record of academic achievement and excellence that few could claim, whether it was graduating with honors from Lycoming College or graduating with honors as well from law school at Dickinson, serving on The Law Review, and then clerking for Judge William Neelon, someone who has had a long and distinguished career on the bench, himself appointed to the bench by President Kennedy and had high standards for his clerks. I know just from that of Tom's ability.

Judge Vanaskie, after his clerkship, worked in several law firms in Pennsylvania, one of them just happened to be the Dilworth law firm where my father was practicing at the time. Although my father was a public official for a good part of his adult life, he probably spent more years as a lawyer. I know of his ability as a lawyer. He was an excellent lawyer and demanded high standards of those around him.

I think I probably, if I could speak for him in this way, would say that he had the highest regard for Tom Vanaskie's ability, his intellect, but also his work ethic, two critically important characteristics of a successful lawyer, and now we know as a successful judge the last 15 years.

He served, as Senator Specter said, since 1994 on the U.S. District Court for the Middle District of Pennsylvania, was made the Chief Judge in 1999, appointed to the Information Technology Committee of the Judicial Conference of the United States by Chief Justice Rehnquist, and I think, in conclusion, I'd say if you look at his academic record, his work as a lawyer, and now his work for 15 years as a judge, there are a couple of ways to describe all of those and I think is a forecast of what he would do on the U.S. Court of Appeals for the Third Circuit.

The following, I think, distinguishes him: excellence, knowledge of the law, fairness, temperament, and character, all of the elements or all of the characteristics that we would hope every judge possesses. So I am honored, both honored and proud, to recommend to this Committee the confirmation of Judge Thomas I. Vanaskie for the U.S. Court of Appeals for the Third Circuit.

Thank you.

Chairman LEAHY. Well, thank you, Senator Casey. The recommendation means a great deal. As you know, the admiration I had for your late father, what you say about him, that carries also a great deal of weight. I also know that you have a back-to-back schedule the rest of the afternoon and will have to be leaving us, but I appreciate you being here.

So, Mr. Vanaskie, if you would step forward, please. I should say Judge Vanaskie. Please raise your right hand and repeat after me.

[Whereupon, the witness was duly sworn.]

Chairman LEAHY. Thank you. Please sit down, sir.

Judge, did you have an opening statement that you wished to give?

STATEMENT OF THOMAS I. VANASKIE, NOMINEE TO BE JUDGE IN THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT

Judge VANASKIE. Senator Leahy, I do not have an opening statement.

If I could be so bold as to request to introduce some of the members of my family who are here today.

Chairman LEAHY. Of course. Please. Please do so, sir.

Judge VANASKIE. I'm awfully proud to say that my mom, who will be 86 years young later this month, is here with us today, Delores Vanaskie. I know my dad, John, is here with us in spirit, the World War II Pearl Harbor survivor, a World War II veteran who was a great influence on us all.

My wife, Dot, is here. Dot is a preschool teacher back in Scranton, Pennsylvania. Joining us are my daughter Diane, who is an English teacher—high school English teacher—in Massachusetts, along with her husband, Todd Mulligan, our son-in-law.

Our son Tom is with us as well. He's a recent summa cum laude graduate from the Washington College of Law at American University, and now clerking for Hon. Royce Lamberth, Chief Judge of the D.C. District Court.

I know my daughter Laura, and architectural historian and architect/designer in Southern California is with us by webcast, and I want to commend the Committee for making these proceedings available, and so accessible and so transparent.

Also with me today is my oldest brother, Dr. Michael Vanaskie, a child psychologist in Concord, New Hampshire, and my sister, Mary Lou Osevala, who runs a cardiac care unit at the Hershey Medical Center, and with her is her husband, Ron. I have a number of friends and others, and workers who are with us here today as well, including Joe Gaughan, Marty Pane, Tawny Alvarez and her husband Greg, Tom Brown, who practiced law with me for a long time, Kyle Elliott, one of my current law clerks, Shintaro Yamaguchi, who was a former law clerk of mine, and others, and I thank them for being here.

Chairman LEAHY. Would they all please stand up, the ones just introduced by Judge Vanaskie. Boy, you sure know how to pack a room.

[Laughter.]

Chairman LEAHY. Thank you all for being here. I am not singling anybody out particularly, but having your mother here must be of particular pleasure. I know, to have at least my first two terms in the Senate, my parents there was very special, both for them and for me.

Judge VANASKIE. It certainly is, Senator. It was certainly special to have our father, my dad, with us 15 years ago when I had my first confirmation hearing.

Chairman LEAHY. I was going to say, that was—I know the record showed that he was there, and I appreciate that.

Now, the courts, Judge, as you know as well as anyone, with your extensive experience on the bench, are the one undemocratic branch of our government—undemocratic in the sense that you're appointed and that's it, you're there for life. So I think that they have a special duty to the American people, especially the people who have the least amount of power and least amount of protection.

Now, you have had 15 years on a trial court, a very active, real one. I've read the background of the cases you've held, and all. What has that done to teach you about the difference in backgrounds in people and the need to be sensitive to them?

Judge VANASKIE. Well, it's taught me a lot, Senator. It's taught me a lot in terms of being sensitive to the different backgrounds that people bring, to the different circumstances in which they find

themselves that result in a controversy, being in a court of law. I come from a blue collar background and so I'm certainly sensitive to the fact of economic deprivation.

But more importantly, I've learned a lot about cultural differences that are brought to bear on the cases that must be adjudicated.

I've learned that you must try to understand that those differences exist in looking at the motivations of those who appear before you. So I think, if anything, it's caused me to be more sensitive to things that, as a practicing lawyer, maybe I didn't pay enough attention to, sir.

Chairman LEAHY. Well, even as a practicing lawyer, did you have cases where somebody had to stand up for what would be considered the less powerful against the more powerful?

Judge VANASKIE. I did, Senator. I accepted court appointments. I represented an inmate who was challenging the legality of longterm administrative segregation. I was appointed by the Court of Appeals to argue that matter before the Court of Appeals and brief that. I represented individuals in employment discrimination cases, both in terms of gender discrimination—a woman who had applied to become a police officer and had scored the highest on the civil service exam but was not selected, and we were successful in that endeavor. I represented individuals in age discrimination cases, including my father in an age discrimination case.

Chairman LEAHY. Well, Judge, you also—I've noticed in recent decades we've had a very activist Supreme Court, especially in the last 10 or 15 years. They've struck down an unprecedented number of Federal statutes, most notably several designed to protect the civil rights of Americans beyond Congress' power under Section 5 of the Fourteenth Amendment, as far as *Flores v. City of Boerne*. Senator Specter, I, and several others have talked about the Supreme Court basically legislating. During the argument on the Voting Rights Act, it looked like some were about to strike down a key provision on the Voting Rights Act. There was a very significant outcry across the country and they limited, from what appeared from their questions, what they were going to do.

But they, in recent decades, struck down statutes as being outside the authority granted Congress by the Commerce Clause, such as *U.S. v. Lopez*, *U.S. v. Morrison*, and then in 2005 we have *Gonzalez v. Raich*. What's your understanding of the scope of Congressional power under Article 1 of the Constitution, particularly the Commerce Clause. I fully understand that as a Court of Appeals judge, you are bound by decisions of the Supreme Court. But what is your understanding of Congressional power?

Judge VANASKIE. Well, Senator, in reference to the Commerce Clause, my understanding of Congressional power is that it is extremely broad and that deference must be given to Congressional judgments based upon Commerce Clause powers, supported by findings of fact, so that in my judgment, the power is extremely broad.

Chairman LEAHY. We have heard nominees, especially for the Supreme Court, speak of reliance on *stare decisis*, understanding of course the Supreme Court can overrule even their past decisions. But would you please give me your philosophy on *stare decisis*?

Judge VANASKIE. Yes, Senator. With respect to *stare decisis*, I believe

that the stability of the law depends upon lower courts following the pronouncements of higher courts, and that stare decisis is an important, important principle in our system of justice. Litigants and the public need to know that they can rely upon courts following precedents that are controlling or governing in a particular situation, and so it's a bedrock principle, as far as I'm concerned, of our system of justice, and that is that stare decisis is to be—is to be respected. I think that any approach to the decision of a case has to—has to take that into account, has to recognize that.

Chairman LEAHY. Thank you. You know, I'm always looking at the question of checks and balances. We have the Congressional check, we have Congressional oversight, but we also have the courts as checks against abuse of executive or Congressional powers. You'll be in a stronger position in the Court of Appeals. I assume, based on everything I've heard about you, everything I've read about you, that's a responsibility you're willing to take on and exercise. Is that correct?

Judge VANASKIE. It is a responsibility that I am willing to take on and exercise, Senator, but it's also one that I recognize, the authority has to be exercised very carefully and only under very extreme circumstances.

Chairman LEAHY. Thank you very much, Judge.

Senator SESSIONS.

Senator SESSIONS. Judge, congratulations on your nomination. To follow up on Senator Leahy's questioning, you recognize, do you not, that the Constitution is the supreme law of the land and you're bound by that?

Judge VANASKIE. Absolutely, sir. I took an oath to defend, obey, and show true faith and allegiance to it.

Senator SESSIONS. And as a Court of Appeals judge, you're bound by the plain holdings of the U.S. Supreme Court with regard to the Constitution.

Judge VANASKIE. Yes, sir.

Senator SESSIONS. Judge, in 2007, you spoke before an adult education class regarding the current sentencing regime and the disparity between crack and powder cocaine. I agree with you that that disparity is too great and have offered legislation for almost 10 years now to fix it, and maybe this year we will be able to do that.

In your remarks, though, you suggested that the International Convention on the Elimination of All Forms of Racial Discrimination, which prohibits signatories from having laws that have "an invidious discriminatory impact regardless of intent" could be used to challenge that Congressionally passed law.

You then cited Supreme Court cases of *Lawrence v. Texas* and *Roper v. Simmons* as a precedent for that. And with respect to *Lawrence* you said, talking about the Supreme Court in *Lawrence*, "The court utilized international law to strike down an unjust domestic statute." And with respect to *Roper* you said, "Because of the overwhelming international consensus prohibiting this practice, the court found that it violated the Eighth Amendment", *Roper* being the death penalty for minors, is that correct?

Judge VANASKIE. That's correct, sir.

Senator SESSIONS. Well, these were established laws of the United States. As the crack/powder—I feel like we need to fix it, but we haven't been able to get it done. But do you think that if you feel like a statute is unjust, that you can look around the globe and see if you can find a global opinion and that that would justify you striking it down?

Judge VANASKIE. Senator, thank you for that question. No, I don't think that if I feel a law is unjust I could look around to see how that particular matter has been handled by other foreign nations. In the context of that particular talk I gave at a class, my reference to the International Covenant on Elimination of All Forms of Racial Discrimination was from an academic perspective and was just suggesting a type of argument that may be made, recognizing that in the intervening years the Supreme Court has made decisions in the crack cocaine area that have changed how judges may approach that particular disparity in terms of the 101:1 ratio.

So, no, sir, Senator. I do not believe that you can, because you feel a law is unjust, look to international sources.

Senator SESSIONS. Well, you know, when they talk about “overwhelming international consensus”, first, I don't know there is one on this subject. And usually when people say that, they usually mean somewhere in the world they can find some people who agree with them. No surveys are done on this. We also make reference to the world community. I'm not sure they call a roll and have the world community vote. People just say “the world community thinks this and that.”

I just would—I'm glad—I think your answer is respectful of the Constitution. I hope—I believe—it is on what you just said. But I do think we have to understand that judges, do you not agree, regardless if there is a world opinion contrary, your obligation, your oath is to render your verdict under the Constitution of the United States.

Judge VANASKIE. I understand that, sir.

Senator SESSIONS. You also said in a speech, “I also propose that the rule of law is best preserved by a model of judicial restraint, and that the executive and legislative branches are in the best position to make policy judgments.” Do you still stand by that?

Judge VANASKIE. I still stand by that. Yes, sir.

Senator SESSIONS. Good. And you stated that judicial restraint is intended “to assure that decisions are not based upon personal values or preferences but are instead made according to law,” and I think those are good statements.

Thank you, Mr. Chairman. My time is up.

Chairman LEAHY. Thank you, Senator Sessions.

Senator Kohl.

Senator KOHL. Judge Vanaskie, although you're bound by the precedent of your circuit and the precedent of the U.S. Supreme Court, as a Federal judge you will be called upon to decide cases where there is no precedent or where the precedent does not clearly determine the outcome. How do you intend to approach these kinds of cases?

Judge VANASKIE. I intend to approach those kinds of cases, Senator Kohl, in the way that I would approach any particular issue:

first, with utmost impartiality; second, with careful attention to the language that has been chosen at the instrument that is under consideration, the document, whether it be the Constitution, or a statute, or a contract; the apparent purposes of the instrument in question; the parallel provisions that may exist in that particular instrument to try to understand what may be intended by the language that has been used in that particular instance that's under consideration; the precedent that may be analogous to it, or precedent from other jurisdictions that may help to form a better understanding—when I say “other jurisdictions,” other courts of appeal is what I'm referring to—and all of those factors, as well as traditional understandings, traditional sources of laws.

Senator KOHL. All right.

How would you describe your judicial philosophy?

Judge VANASKIE. I would describe, Senator Kohl, my judicial philosophy along those lines, that is, one where, first, it is important that the jurist approach every matter, both with impartiality and the appearance, the utmost appearance of impartiality, fairness, and even-handedness and openness, receptiveness to considering the arguments of each party that is presented to you for purposes of understanding the argument and making sure that each litigant understands they've received a fair hearing, and left with the understanding that, regardless of the outcome, they've been treated

with the respect and fairness to which they're entitled.

Senator KOHL. Judge Vanaskie, you've been a trial court judge for 15 years now. If you're confirmed as an appellate court judge, you'll be sitting on panels of three judges, and in order to form a majority opinion, will need to convince at least one other judge to agree with you. How will you approach this difference in decisionmaking?

How will you seek to reach consensus with your colleagues?

Judge VANASKIE. Thank you, Senator Kohl, for that question. I've thought a lot about that. I've had the occasion now to sit, by designation on the U.S. Court of Appeals for the Third Circuit, three times in the last 3 or 4 years, so I've been in that position where I have engaged in the discussions where an attempt is made to reach common ground on particular issues. I would try to use the power of persuasion.

My analysis of the facts and my understanding of the law, in order to try to reach a majority, or preferably unanimous conclusion with respect to the matter. Failing that, if I'm unable to convince another person, then I hope to have the courage to write an appropriate opinion that expresses my point of view.

Senator KOHL. Very good.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much.

Senator SPECTER.

Senator SPECTER. Judge Vanaskie, again, congratulations on your nomination, and congratulations on your outstanding career. It's nice to have so many of your friends and family with you today to share in this honor. It's a very nice day for you, your family, and for Pennsylvania.

When you talk about the judicial role to interpret rather than to make law, those concepts have been amplified on a longstanding debate between original intent as to what the founding fathers

meant and what the drafters of the amendments meant, contrasted, as Palko would say, with the changing values of a society.

It comes into sharp conflict, say, with original intent on the Fourteenth Amendment, adopted in 1868 on equal protection, at a time when the Senate galleries were segregated and the Senate voted for equal protection. But no doubt they didn't have integration in mind on the segregation.

Now, you may not be called upon to decide cases exactly in that framework, but if you were, how would you balance those considerations of evolving societal values contrasted with original intent?

Judge VANASKIE. Senator Specter, that is an extremely interesting question and one that certainly there is tremendous amount of debate in academia. From a judge's perspective, I start with an understanding that the Constitution is to be an enduring document. It is one that is to be interpreted, first with an effort to understand its terms, the apparent purposes behind particular provisions.

Senator SPECTER. Would that enduring document include the intent of the founding fathers over societally evolving values?

Judge VANASKIE. I think, Senator, to answer your question, it would be an attempt to understand how the founding fathers would have intended the constitutional provision to be applied in the current setting.

Senator SPECTER. Judge Vanaskie, have you come across the Doctrine of Proportionality and Congruency in an evaluation of the adequacy of a congressional record? It used to be sufficient to have a rational basis, but more recently the Supreme Court has said the standard is "proportionate and congruent". I've been trying to figure out what that means. Could you help me?

Judge VANASKIE. I'm afraid I cannot, Senator, as I am not familiar with that.

Senator SPECTER. Well, Judge Vanaskie, as bright as you are and as excellent as your record is, if you are familiar with it, I don't know your answer would be any different.

[Laughter.]

Senator SPECTER. Have you confronted the situation where there have been circuit splits? The Third Circuit has not ruled—and I ask this question in the context of the Supreme Court having turned down circuit splits. I pressed for a long time to require the Supreme Court to be televised, and I'm about to modify that approach with a sense of the Senate resolution to urge the Supreme Court to accept television, to have some transparency and accountability. You have lifetime appointments and you have virtual lack of knowledge anywhere on the intricacies of the Supreme Court, unless you're really good at reading footnotes. There are many circuit splits where the court doesn't decide it, citizens were treated differently depending on where they live, and in other circuits which have not decided the district judge would be battling, should I follow the Fourth Circuit or the Eleventh Circuit. Have you faced that problem?

Judge VANASKIE. Senator Specter, I certainly have faced that problem.

Senator SPECTER. Do you like it?

Judge VANASKIE. I do not like it, sir, because now I'm trying to determine what the result would be of our Court of Appeals when

it finally gets there.

Senator SPECTER. Well, now I've set you up for the real question of this sequence, Judge Vanaskie, and that is your sense of television. I've been questioning many—television in the court.

[Laughter.]

Senator SPECTER. Senator Leahy and I have discussed the subject for decades, eons, and twice the Committee has voted out legislation, once during my tenure as Chairman, once during Senator Leahy's tenure as Chairman, and it's been introduced again. I've decided to take a little different approach because Judge Souter has left the bench, and he said cameras would roll in over his dead body. There's a great reluctance in the court to go against somebody's view.

Judge Sotomayor, Justice Sotomayor, testified about a good experience she had had. Do you think that television in the Supreme Court would inhibit or materially affect the conduct of the lawyers or the justices, balanced against the insight that it would give to the public as to this great institution which has the last word on so many tremendous decisions without any transparency, and lifetime appointments? A pretty good insulator. What do you think?

Judge VANASKIE. Well, Senator Specter, it certainly is not my call to make. If you are asking for my personal opinion, I happen to favor more transparency in court proceedings in general. I know what the Judicial Conference policy is, and I served as a member of the Judicial Conference. I know the policy is to prohibit televised court proceedings. But I think we go a long way to opening up and promoting understanding of the workings of the courts if we were more open-minded with respect to that particular matter.

Senator SPECTER. It's hard to do, Judge Vanaskie, but you've just won my more enthusiastic support.

Chairman LEAHY. I think, Senator Specter, we had already marked him down here as tentatively leaning your way.

[Laughter.]

Senator SPECTER. The Chairman understates things.

[Laughter.]

Senator SPECTER. I have one final question, Mr. Vanaskie, which I don't think will be determinative of your nomination. But I note in your resume you were inducted into the Shamoken, Pennsylvania chapter of the Pennsylvania Hall of Fame, recognized as the First Academic All-American in football. Two questions. What does that mean?

[Laughter.]

Senator SPECTER. And second, how has it helped you in your career?

[Laughter.]

Judge VANASKIE. The coal country has a proud tradition of its athletics, and it was a great honor for me to be named to be part of the Shamoken chapter of the Pennsylvania Sports Hall of Fame for my career in football.

Senator SPECTER. Were you quarterback?

Judge VANASKIE. I was a defensive back. I was a safety, and I returned punts and kick-offs.

Senator SPECTER. You played two ways?

Judge VANASKIE. In high school two ways, but in college just one way.

Senator SPECTER. Thank you very much, Judge Vanaskie.

Chairman LEAHY. I would note, Judge Vanaskie, in 35 years on this committee, that's the first time I've heard that question asked as to what you played, football.

[Laughter.]

Chairman LEAHY. I would also note that while we tell you to always be fair, and careful, and everything else, even on this Committee I can make a mistake. I had not seen Senator Coburn come in, and he should have gone, followed Senator Kohl. I've already apologized to him, but I would note that for the record. I'm rather scrupulous trying to protect everybody's rights on this Committee. So, Senator Coburn.

Senator COBURN. Well, welcome.

Judge VANASKIE. Thank you, Senator.

Senator COBURN. I have a few questions for you.

The first one I would ask, you just agreed that the power under the Commerce Clause is very broad. Can you give me your opinion as to what limitations the Constitution places on this power to regulate interstate commerce?

Judge VANASKIE. Senator Coburn, that, again, is a very interesting question and one that certainly divides the courts, not only academic community. I'm not sure I can give you a definition. I think part of the problem is trying to determine where the line should be drawn.

Senator COBURN. How about the limitations that you would see?

Judge VANASKIE. I suppose, Senator, in the abstract, there must be—since it is the power to regulate commerce, there has to be a determination as to when commerce is impacted by the particular congressional enactment, if that is the found of the authority for the congressional enactment. And I know there have been Supreme Court decisions—they were mentioned, Lopez and Morrison—which drew lines and determined that they were beyond the authority of Congress under the Commerce Clause. I'm not prepared, sir, to say that those were appropriately drawn.

Senator COBURN. That's fair.

The reason that question is important to me is, we're debating health care bills that are going to mandate a fine, a tax on individuals in this country if in fact they don't purchase something that we think they should be forced to purchase. So it may be something that's very much in front of you in the next year or so, as I'm sure somebody's going to challenge that if it gets through this institution. I want to go to a couple of things that I go to with every Circuit Court nominee, and it has to deal with the utilization of foreign law. Can you state for me anywhere you find in our founding documents, the Constitution, or even the Federalist Papers, any authorization for a Federal judge to use a consideration of what other countries think in their legal system in terms of interpreting our codes, our Constitution, and our treaties?

Judge VANASKIE. Senator, I couldn't cite to you anything in the Constitution or in the Federalist Papers, but I don't pretend to be an expert on the Federalist Papers, other than perhaps 78 and 79 that deal specifically with the judiciary, and I cannot think of anything that would be in there.

I do think, however, that when it comes to treaty obligations, a

common source of interpretation of treaty obligations can be how other member nations have applied certain provisions that may be an issue or that may not be clear. I will say to you, Senator, that in one case I had I did cite to decisions from other states—that was the Kazam case—because at issue in that case was the Convention Against Torture, whether, for example, in our case, whether diplomatic assurance could be deemed reliable so as to enable a state to return an alien, I looked to foreign—to authority of foreign jurisdictions for purposes of deciding how other states have handled diplomatic assurances. In that case, I found other states recognized the authority of diplomatic assurances and therefore we could recognize diplomatic assurances.

I looked at it from another perspective as well, and that is what other states have done in terms of addressing the argument that there could be no impartial review of the reliability of a diplomatic assurance, and looked at, when the argument is made—when the argument in our case was made that it would interfere with the executive's foreign relations prerogative, and I did rely on authority not in terms of any binding precedent but in terms of understanding—certainly it would never be binding, but in terms of understanding how other jurisdictions, how other states had considered that particular issue.

Senator COBURN. Fair enough.

Do you believe that there is a—believe the right to self-defense is a fundamental right? I'll put it in doctors' terms. Do you believe I, as an individual, have a fundamental right to defend myself, my body, my person?

Judge VANASKIE. I think, in terms of a right of self-defense, it depends upon the context and circumstances and I'm not prepared to answer that particular question in terms of the hypothetical you gave in terms of an infant. I haven't—I know it is a very important issue and one that may come before the court.

Senator COBURN. I'm not sure I mentioned infant. I'm just talking about me personally. Do I have a personal, fundamental right to self-defense?

Judge VANASKIE. I think if you're——

Senator COBURN. Sitting here right now.

Judge VANASKIE. I think if somebody attacked you, you would have a fundamental right of self-defense.

Senator COBURN. All right. Thank you.

Do you believe the right to bear arms is a fundamental right?

Judge VANASKIE. I—I think it is a right that has been recognized by the U.S. Supreme Court. I think how that right is applied in particular instances with respect to particular types of weapons is an issue that still needs to be addressed and still needs to be resolved, and I think certainly there's legislative authority in that area.

Senator COBURN. Okay. Thank you.

What principles of constitutional interpretation would you look to in analyzing whether a particular statute—and you can think of any one that you've got—infringes on some individual right guaranteed in the Constitution? Just kind of walk me through your thought process or the principles that you would use to lay that out and discover that for yourself and apply the law.

Judge VANASKIE. With respect to a law that implicates a particular right, I would look to the Constitution to see what purpose was intended to be served by that particular right, how it was valued, how the legislative enactment impacts on the exercise of that right, does it substantially burden the exercise of that right or is it an insubstantial burden? Is there a way to interpret the statute in such a way that a constitutional decision need not be made, if it can be interpreted that way, to reconcile the legislative provision with the constitutional right at question.

Ultimately, however, if under the existing—and I certainly would start with existing precedent and what existing precedent tells us to do in terms of our analytical framework and analyze it in that way, ultimately if I were to conclude that the fundamental right is infringed by the particular provision, then I think my oath to be faithful to the Constitution would require that result.

Senator COBURN. Thank you.

Mr. Chairman, if I might, just one more. I've got to leave. Well, I was supposed to leave at 3:00 p.m. But one of the problems—and you may have a lot of experience in that—is when you look at some of the statutes that we pass, is trying to determine congressional intent. I'm just wondering, how often do you read the statements, the majority opinions, the report language for a lot of these statutes that we pass? Do you frequently look at that to see what the majority/minority opinions were on that in terms of the intent of what we're trying to accomplish rather than what the statute actually says?

Judge VANASKIE. Senator, I try to start and hopefully confine myself to the language of the statute itself. If the language of the statute is clear, there's no need to go beyond it. It should be applied as written.

Senator COBURN. But if it's not clear?

Judge VANASKIE. If it's not clear, then I would go to other sources of legislative interpretation, considering the overall purpose of the statute, considering the structure, other parallel provisions. I drafted an opinion in an environmental case back when I sat on the Third Circuit in the 1990s that did just that, looked at traditional understanding. As a last—I think, Senator, as a last resort you can consider, and should consider, legislative history, but it should not be the starting point of the analysis.

Senator COBURN. All right. Thank you very much.

Thank you for the indulgence.

Chairman LEAHY. No, thank you, Senator Coburn. I appreciate you being here.

Unless there are further questions, Judge Vanaskie, thank you very much for being here. I know you—it's going to empty the room a little bit when you leave here, but we will stand in recess for about 3 minutes while you have a chance, and your friends and family, to leave, or stay if you'd like, but you probably have other things to do, to leave, and we'll re-set the table for the next panel.

Judge VANASKIE. Thank you very much, Senators. Thank you.

EVAN WALLACH
WEDNESDAY, SEPTEMBER 7, 2011
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Committee met, pursuant to notice, at 2:33 p.m., Room SD-226, Dirksen Senate Office Building, Hon. Sheldon Whitehouse presiding.
Present: Senators Franken, Schumer, Feinstein, and Grassley.

OPENING STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator WHITEHOUSE. This hearing will come to order. We have a number of nominees for Federal court to consider today and we have a number of colleagues who are here to make introductions, and I will call on my colleagues in the following order. I'll start with Senator Baucus and Senator Feinstein, and then Senator Tester, then Senator Manchin, unless the Majority Leader comes, in which case he will be next.

[Laughter.]

Senator Reid, would you like to be recognized and introduce your nominee? I'm sure Senator Manchin will be happy to allow you priority.

PRESENTATION OF EVAN WALLACH, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE FEDERAL CIRCUIT BY HON. HARRY REID, A U.S. SENATOR FROM THE STATE OF NEVADA

Senator REID. We just had our caucus, as you know. I have to always do my once-a-week press event.

Evan Wallach is really a good man and has been a tremendous judge. I think he's a perfect nominee for the Court of Appeals for the Federal Circuit. He is also a scholar, and I don't use that term flippantly. He's graduated from the University of Arizona and got his law degree from Berkeley, but that one law degree obviously wasn't enough. He went and got a graduate degree at Cambridge in England. By the way, he was a partner in a law firm when he did that, took a leave of absence to go get that degree.

He is also a patriot. Again, I don't use that term loosely. As a boy, guided by the patriotism taught to him by his mom, dad, and his two older brothers, he is a 115-pound man—nothing wrong with small people. I have lots of them in my family—he volunteered for the military and went to Vietnam, carried a rifle, and did all the other things that happened during that brutal war. He and his two older brothers, as I indicated, volunteered to serve in Vietnam. He was awarded a Bronze Star.

Evan Wallach served his country in Vietnam. When he was a partner in a law firm, very, very busy, the first Iraq war broke out. He quit his job on a temporary basis, came back, and again reentered the military, served in the Pentagon for many months. Took a leave of absence from his law practice and served as an active duty attorney. He served in the office of the Judge Advocate General of the Army at the Pentagon station at the Pentagon. He really is a patriot.

He served his country bravely in war, he has served his country well as a judge in the U.S. Court of International Trade. He has written hundreds of opinions as a judge on the Court of International

Trade. He has also served as a circuit judge in the second, third, and ninth circuits, and a district court judge in Nevada, New York, and the District of Columbia. Because so much of his responsibility will be what we do with the new patent law, one of the cases he heard in Nevada is a patent case.

I introduce my friend to all of you, but also say that—and I don't want to be overly rambunctious here and I hope this doesn't hurt him, but he's my friend. He is one of the best friends I've ever had. I think the world of this man. I recommended him to President Clinton to leave this lucrative law practice to go into public service, and he did that. He is someone who I admire do greatly. He is a poet. He writes poetry. His mom was a wonderful artist, who just died. I have some of her paintings and etchings in my home in Nevada. I wish I had the ability to convey to this Committee what a wonderful human being he is and how fortunate we are as a country that he would be willing to not see how much money he can make, but he's decided instead to see what a difference he can make in public service.

Senator WHITEHOUSE. Thank you, Leader Reid.

Senator REID. Could I be excused?

Senator WHITEHOUSE. You certainly may.

Senator REID. Thank you all very much.

Senator WHITEHOUSE. I will now have the privilege of yielding to the Ranking Member to make a brief opening statement, and after that we will have Judge Wallach as the first panel, then the four District nominees as the second panel.

STATEMENT OF CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. And it will be very brief. I'll put the entirety of my statement in the record.

But I want to welcome all the nominees and their families and friends, and to say that we're moving along on confirmation of nominees. This week we confirmed another nominee on the Senate floor for the Federal Judiciary. We have now confirmed 34 nominees this Congress. We have taken positive action in one way or another on 78 percent of the judicial nominees that have been submitted by the President during this Congress, so we continue to move forward as I indicated I would do on the consensus nominees. It looks to me like we have a group that fall into that category this time.

I'll put the rest of the statement in the record.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Senator WHITEHOUSE. Very well. Thank you, Senator Grassley.

Could Judge Wallach please come forward and remain standing?

[Whereupon, the witness was duly sworn.]

Senator WHITEHOUSE. Please be seated.

Welcome.

Judge WALLACH. Thank you, Senator.

Senator WHITEHOUSE. It is the custom of the Committee to allow for a brief statement by the nominee, and in particular for the nominee to take the occasion to recognize family and friends whom he or she may wish to recognize at this point in these proceedings.

STATEMENT OF EVAN WALLACH, NOMINEE TO BE U.S.

CIRCUIT JUDGE FOR THE FEDERAL CIRCUIT

Judge WALLACH. Thank you, Senator. I'd like to introduce my wife, Dr. Katherine Tobin, who's sitting behind me, who has her Ph.D from Stanford University. She's a very smart person, but her distinction to me is she's the nicest person I've ever met.

I've also got my friend David Olive here, a former client. My friends, Frank and Judy Stearns, I did their wedding. Frank just came back from Afghanistan a couple of weeks ago.

I'd like to thank some folks, if I may, please, Senator.

Senator WHITEHOUSE. Please.

Judge WALLACH. I'd like to thank, first off, the members of this Committee and the staff who I know work very hard preparing for these kinds of hearings, and all the folks who helped me in this process, the people from the DOJ, the FBI, and the ABA, and the AO. All of them do an awful lot of work and I think they don't get recognized for what they do.

Of course, some of my family is watching this from one place or another. I never met Katie's dad. He was a career Naval aviator who died when she was a little girl. But he obviously influenced her.

And I met her mom, whom I love dearly. Both her parents passed, and both mine have passed. As Senator Reid said, my mom was an artist and she just passed in May.

My dad was an engineer. You know, on my birth certificate—the Senator mentioned millwork on my birth certificate. It says my dad's occupation is millworker, and that was true, he was. But he was also working the graveyard shift while he attended the university at night. He went on to get an honorary doctorate from the University of Arizona.

But that wasn't what he was about. He taught me a large thing in life—he taught all three of us boys—and that was to try and figure out what the right thing to do was, and then to do it.

My oldest brother was, I think if you know the term, 4F. He was physically unqualified to serve in the Armed Forces. In Vietnam, a lot of people considered that a blessing. He went as a civilian employee and served 4 years over there. His wife Susan went as well and worked for the army.

My middle brother enlisted in the U.S. Marine Corps and he did a full tour where he was the sole survivor from his unit once, came back, served 30 days in the United States, and went back to Vietnam, where he stepped on a mine and he was one of two survivors the second time. He came back here and got his Ph.D in Engineering, despite the fact that he is 100 percent disabled. He held several patents in the space industry. I'm very proud of them and I know they're watching, as I said, from one place or another.

Thank you.

Senator WHITEHOUSE. Thank you very much, Judge Wallach. Could you just briefly describe the nature of your work on the Court of International Trade and how you think that prepares you and compares to the work you'll be asked to do as a U.S. Court of Appeals judge?

Judge Wallach. Sure. We sit, Senator, as both trial judges in matters like Customs and in administrative appeals, in effect, in trade matters. One is regulated by the Chevron doctrine, the other is heard as a new case, sometimes with juries. And it's obviously

specialized work, but the essence of it is the same as any law. That is, a judge should look at it, try to know the background, read what record you have in front of you, and learn the law and be prepared for a hearing. I think I've sat on some appellate benches and I think it's the same on an appellate bench as it is a trial bench.

Senator WHITEHOUSE. Well,

I'm very impressed at the legacy of service that you bring to this appointment, and I wish you a speedy confirmation.

I will turn over to our Ranking Member, Senator Grassley, then to Senator Franken.

Judge WALLACH. Thank you, Senator.

Senator GRASSLEY. Let me say something before I ask some questions. It may sound like I'm trying to get you or something on an issue that is very personal to me from a policy standpoint, and I'm not trying to do that at all. But I'm trying to bring attention to your court and you'll probably be a member of that court, and maybe you can help this court be a little more reasonable in an area where I don't think they've been very reasonable. So, I've got some questions along that line.

Congress has consistently recognized the value of whistleblowers in government and private sector. I was an original co-sponsor of the Whistleblower Protection Act of 1989, and I've always pushed for strong whistleblower protections for Federal employees.

I think that most of my oversight work comes from one or two areas, either good, substantial evidence that I get from whistleblowers or from enterprising investigative journalism. So whistleblowers,

I think, are a very important part in, is government going to be responsible and transparent and accountable and all that?

The Federal Circuit has issued a number of decisions that have substantially limited the type of disclosures that are protected under the Whistleblower Protection Act, and I wouldn't expect you to be acquainted with these statistics, but up until February 2011 only 3 out of 219 cases that whistleblowers have brought for appeal has a whistleblower won. Three out of 219. Last year, the court was zero for nine against whistleblowers.

Perhaps the most egregious example of the Federal Circuit placing hurdles in front of the Federal Government whistleblowers is a 1999 decision, *LaChance v. White*. In that case the Federal Circuit held that a whistleblower had to present "irrefragable" proof that wrongdoing actually occurred in order to provide a claim. So my questions are kind of along the lines of what maybe you think about or we can think about bringing some reasoning to these figures that I just gave you.

I mean, I would expect that not every whistleblower appeal would be in favor of the whistleblower. In fact, maybe a minority would be in favor of the whistleblower. But in the case of these statistics I gave you, you can see how overwhelmingly it is against it.

Now, maybe you can blame those of us that wrote the 1989 law for not giving enough protection or enough direction to the court.

So my first question is, considering that the Federal Circuit has exclusive jurisdiction over these cases, so you're the only one that's going to hear them. What, if any, experience do you have with the Whistleblower Protection Act? If you say none that's OK, but I just have to ask the question.

Judge WALLACH. Senator, thank you. Thank you for that question. I know about your work with whistleblowers and NIGs. I can't say I have any direct experience at all. I just say that in journalism, I used to argue a lot that the phrase "consent of the governed" always had to mean informed consent when I argued to a court. It's vital that government and the people be kept informed, and obviously whistleblowers have something to do with that.

Senator GRASSLEY. Yes. Have you ever heard of the irrefragable proof standard? If so, what's your understanding of that standard?

Judge WALLACH. My understanding of it is, Senator, that it means that it cannot be refuted, that it's irrefutable proof. It's a very high standard.

Senator GRASSLEY. OK.

So then I suppose the next question is, what does a whistleblower need to prove under that standard to meet it?

Judge WALLACH. Senator, I don't know the answer to that. Obviously I'd look at the case authority and the statute to try to determine it in each case.

Senator GRASSLEY. OK.

Can I ask you whether or not you believe that the irrefragable proof standard or a substantial evidence standard should apply to whistleblower cases? Because, you know, the irrefragable one is a judicial standard, not in the law.

Judge WALLACH. Like everything, Senator, I would be bound by stare decisis. I'd have to look at it, but principle decisionmaking requires me to say that.

Senator GRASSLEY. Wouldn't stare decisis, though, make it almost impossible under that standard to ever improve these statistics I just gave you?

Judge WALLACH. It might be, Senator, that the Supreme Court or obviously the national legislature might be taking a look at it if the courts are wrong. That happens.

Senator GRASSLEY. Well, I would give you this opportunity.

Would you be willing to put in writing your understanding of the irrefragable proof standard and whether or not you agree with this standard for reviewing decisions of the Merit System Protection Board?

Judge WALLACH. Sure. I'd be delighted to, Senator.

Senator GRASSLEY. I would like to have you—since this is a very unique body you're going to, I'd like to ask you any experience you've had, if any—and emphasis upon if any, because maybe you haven't where you have served in the past—but would you please identify what experiences you have had that would come before this court in these four areas: patent law, trade law, government contracts, and claims against the government.

Judge WALLACH. Well, in trade, Senator—thank you. Obviously I've sat for 16 years and so I've learned something in that time, and I like to think I know a bit about it. In patent, as Senator Reid said, I sat on a case. I did some IP, intellectual property, work for my press clients, but it was more along the lines of trademark. I've taught overseas for the U.S. Patent & Trademark Office, teaching foreign judges intellectual property.

Senator GRASSLEY. OK.

Then beyond what you just said that you've had, if confirmed

would you feel a need to prepare yourself in any way to handle these cases, and how would you do that?

Judge WALLACH. Absolutely I'd feel the need, Senator. I would obviously—I'd try to educate myself, so I'd read the law first, the governing authorities from my superior court, the Supreme Court, and from the prior cases of the Court of Appeals, as well as any other cases coming up from other courts that might inform me.

Senator GRASSLEY. I'd like to—the last series of questions would deal with any political activity you've had, and they aren't asked to denigrate any activity or say it's wrong, or that it would have undue influence. But I feel it necessary to ask, because prior to being appointed as a judge on the International Trade Court, you were actively involved in Nevada politics. You worked on Democratic campaigns as the counsel for the State's Democratic party.

There's certainly nothing wrong with that, but your political history may concern future litigants after you're confirmed.

Could you provide the Committee an example of a case you decided as a judge on the Court of International Trade where you put your political views aside to make an independent, sound legal judgment? And I'm not insinuating that politics would enter into your decision, but if there's any case where there was conflict, that maybe you could show where you put it aside.

Judge WALLACH. Senator, thank you for asking that, but I never saw anything where I thought there was a political aspect to it. There were probably some cases where I walked into it feeling one way and the lawyers convinced me the other way, but that was a question of how the law was going, not politics.

Senator GRASSLEY. Well, then I think you'll satisfy me with one last question. I think the answer is probably very obvious, how you've held your demeanor here at this meeting. I'm sure you can assure the Committee then, if confirmed, your decisions will remain grounded in precedent and the text of the law. You said that in the case of the whistleblower cases, but in addition to all other cases rather than any underlying political ideology or motivation.

Judge WALLACH. Yes, sir. Absolutely.

Senator GRASSLEY. Thank you.

Judge WALLACH. Thank you, sir.

Senator GRASSLEY. Thank you, Mr. Chairman.

Senator WHITEHOUSE. Thank you, Senator Grassley.

Senator Franken.

Senator FRANKEN. Thank you, Judge, for testifying. Congratulations on your nomination.

Judge WALLACH. Thank you, Senator.

Senator FRANKEN. Thank you for your service and for your family's service.

I'm interested actually in the International Court of Trade because I don't know much about it. What kind of stuff comes before you? In other words, are you judging whether a country is violating trade laws or a segment of an industry and the country that's doing that? What kind of stuff? Can you give me some examples?

Judge WALLACH. Yes, sir. It's not so much a country, although once in a while you have a national entity appear in front of you. But it's several things. First, we do antidumping and countervailing duty cases. We are a National Geographic court with limited

subject matter jurisdiction.

Senator FRANKEN. I don't know what that means, a National Geographic court. What does that mean?

Judge WALLACH. So we hear any case in the United States that comes from anywhere in the U.S., as long as it falls within our limited area of jurisdiction of law. So that, for example, a claim by the U.S. industry that a foreign company is selling goods for less than the fair market value, in effect antitrust law, that foreign company is trying to capture the market in the United States by undercutting, will be investigated by U.S. Government entities. They're going to rule one way or the other for somebody, and somebody is not going to like it. Whoever it is who doesn't like that ruling takes it up to us. That's why I said before we sit in that area, in effect, in an administrative appellate review.

Senator FRANKEN. I see.

Judge WALLACH. We also do Customs cases. Those are brand-new ones where somebody imports something into the country and they're saying one of two things, either Customs said it was one thing and it's really something different so we should pay a different tariff, or we agree what it is, but Customs says it's worth a whole bunch more money than we think it's worth, so you're imposing a much higher value on it and, as a consequence, a higher duty. And so they come in and they actually have trials about that.

Senator FRANKEN. OK. So you're an appellate court on trade matters.

Judge WALLACH. Yes, sir.

Senator FRANKEN. And what happens? Can they appeal higher than you?

Judge WALLACH. Yes, sir.

Senator FRANKEN. Where do they go then?

Judge WALLACH. They come to the Court of Appeals for the Federal Circuit. It's our appellate court.

Senator FRANKEN. OK.

So if some—China, say, is dumping a certain kind of finished paper product, that might be something that you would hear?

Judge WALLACH. We would hear a case involving a Chinese company. I have heard such cases.

Senator FRANKEN. OK.

Then you decide and then it goes to an appellate court.

Judge WALLACH. If a party doesn't like it, they take it up to the court for which I'm nominated.

Senator FRANKEN. OK.

And then if they don't like that, where do they go?

Judge WALLACH. The Supreme Court, sir.

Senator FRANKEN. OK.

And how often do those kind of things go to the Supreme Court?

Judge WALLACH. Not often that they actually grant a writ of certiorari, but it happens occasionally.

Senator FRANKEN. OK.

And so China has to abide by it since it's shipping into the United States?

Judge WALLACH. That's correct. In effect, what happens is, there's a tariff imposed. So as the goods come in, that money is going to have to be paid.

Senator FRANKEN. So there's no international trade adjudicator on trade agreements?

Judge WALLACH. Well, there's the World Trade Organization.

Senator FRANKEN. Yes. Where does that fit into this process?

Judge WALLACH. We pay no homage to the WTO. We are purely a U.S. court and we follow the U.S. law and what the Congress tells us to do.

Senator FRANKEN. So you don't have to pay homage to them?

Judge WALLACH. We don't have to.

Senator FRANKEN. I think that's good.

Judge WALLACH. We don't kiss rings or anything.

Senator FRANKEN. But I meant, it seems to me then—I just want to get this clear. Are there—who has jurisdiction sometimes? Is there a question whether you have jurisdiction or the World Trade Organization has jurisdiction?

Judge WALLACH. No, sir. We would have jurisdiction over a case. It might well be that they're hearing the same issue over in their appellate panels and they might decide it totally differently.

Senator FRANKEN. Well, who wins, then?

Judge WALLACH. Well, as far as we're concerned, as far as the U.S. courts are concerned and the U.S. Government, our rulings are rulings in the United States and they apply. If a WTO decision is contrary, it might be that they give the litigants the ability to enter sanctions on an international basis, apply tariffs or something along those lines. But it really has nothing to do with us as a court.

Senator FRANKEN. I'm just trying to think of who has the ultimate authority.

Judge WALLACH. As far as we're concerned, the Supreme Court of the United States, and that's it.

Senator FRANKEN. OK. But if you're in conflict with the WTO it's not like you're calling Ban Ki-moon or something.

Judge WALLACH. No, sir.

Senator FRANKEN. OK. OK.

Well, that's good. I just wanted to learn a little bit. It's not that often in these things that I learn about something in this way.

Judge WALLACH. Thank you, Senator. That's very kind of you say.

Senator FRANKEN. I'd like to learn more sometime. Thank you.

Judge WALLACH. Thank you, Senator.

Senator WHITEHOUSE. Judge Wallach, I wish you well as you go through the confirmation process under the leadership of Chairman Leahy and Ranking Member Grassley. We have moved fairly smoothly through the nominees here at the Committee level; the floor is a different question. There tends to be a considerable backup there, so don't be discouraged that you get through the Committee and then there are delays on the floor. But I think you've been a very impressive nominee and I hope that you can see to rapid progress for your nomination through both of the obstacles that are ahead of you in the Senate. I wish you well, and thank you for being here. I appreciate that your family and friends have attended.

Judge WALLACH. Thank you, Senator. Thank you, Senator Grassley, as well.

Senator GRASSLEY. You bet. Thank you.

PAUL WATFORD
TUESDAY, DECEMBER 13, 2011
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:01 a.m., Room 226, Dirksen Senate Office Building, Hon. Sheldon Whitehouse, presiding. Present: Senators Feinstein and Grassley.

OPENING STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND
Senator WHITEHOUSE. Good morning. The hearing will come to order.

We are here today to consider the nomination of Paul J. Watford to the United States Court of Appeals for the Ninth Circuit. I welcome Mr. Watford and his family and friends to the U.S. Senate.

We have a statement for the record from Senator Boxer in support of the nominee, and she has mentioned to me her confidence in him. But given the week that we are about to have and the role of the Environment and Public Works Committee, which she chairs, and trying to defend against some, what many of us consider, extremely ill-advised attacks on our pollution control regimes, our environmental policies, she is unable to be here. So with unanimous consent, her statement will be admitted to the record. [The prepared statement of Senator Boxer appears as a submission for the record.]

Senator WHITEHOUSE. I will simply say that voting to confirm an individual to the Federal bench is one of the most important decisions that a Senator can make. Every day of our lives, Federal judges make decisions that affect Americans' lives in all walks of life.

In doing so, judges must respect the role of Congress as representatives of the American people. They must decide cases based on the law and the facts, and not prejudge any case. They must listen to every party that comes before them fairly. They must respect precedent, and they must limit themselves to the issues that are before the court to decide.

Judicial nominees also must have the requisite legal skill to serve as a Federal judge. Mr. Watford has an impressive record of achievement that has earned him a unanimous Well Qualified rating from the American Bar Association.

It is important to fill this seat on the Ninth Circuit in a timely manner. There are currently four judicial emergency vacancies on the Ninth Circuit. The Chief Judge of the Ninth Circuit, Alex Kozinski, along with the members of the Judicial Council of the Ninth Circuit, have written to this Committee, describing the Ninth Circuit's "desperate need for judges" and urging the Senate to "act on judicial nominees without delay." Chief Judge Kozinski wrote of the extensive vacancies on the Ninth Circuit: "We fear that the public will suffer unless our vacancies are filled very promptly."

In the interest of efficiency, let me outline how this hearing will proceed. The Ranking Member will make his remarks, Senator Feinstein will then introduce Mr. Watford, and Senators who are

here for the hearing will have 5-minute rounds for questioning of the nominee.

With that, I turn to our distinguished Ranking Member, Senator Grassley.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM IOWA

Senator GRASSLEY. Thank you to Chairman Leahy, because he worked very closely with us on scheduling this hearing and the agenda for the hearing, and I am pleased that we were able to reach an agreement. Today as you have said, Paul Watford is before our Committee as a nominee for the Ninth Circuit. We have gone over his biography so I am not going to go into that, but I am going to have a full statement I am going to put in the record. Before that statement goes in the record, I would note that we are making real progress in regard to the nominations of President Obama to the Federal judiciary. Today marks the 19th nomination hearing held in this Committee this year, and we will have heard from 71 judicial nominees. That would be nearly 88 percent of President Obama's judicial nominees that have received a hearing. We have confirmed 63 judicial nominees in this Congress alone, and in total that would be 72 percent of President Obama's nominees being confirmed on the Senate floor.

Again, I welcome the nominee, his family, and look forward to the testimony. I will have a few questions, and maybe some questions to submit in writing. But I would like to have a full statement put in the record.

Senator WHITEHOUSE. Without objection, that will be so.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Senator WHITEHOUSE. Now to introduce the nominee from her home State, I turn to the distinguished Chairman of the Intelligence Committee and a senior member of this Committee, Senator Dianne Feinstein.

PRESENTATION OF PAUL WATFORD, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT BY HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman. Welcome, Mr. Watford.

I am very pleased to express my strong support for the nomination of Paul Watford to the United States Court of Appeals for the Ninth Circuit. If confirmed, Mr. Watford would be only the fourth African-American ever to sit on the Ninth Circuit. He would also be one of only two African-American active judges on a 26-member court.

He has a distinguished record that has prepared him well for the Circuit: he served as a Federal prosecutor in Los Angeles, and has over a decade of appellate experience in private practice. He has earned the respect from attorneys on both sides of the aisle, and I am confident that, if confirmed, he is going to serve with distinction on the court. I urge my colleagues to support his nomination.

He is a native Californian, born in Garden Grove, and has had a 17-year legal career. He has earned degrees from two of California's finest public universities: his bachelor's from U.C. Berkeley in 1989, and his law degree from the University of California Los Angeles

School of Law in 1994. He was an editor of the UCLA Law Review and graduated Order of the Coif.

After finishing law school, Mr. Watford clerked for Ninth Circuit Judge Alex Kozinski, an appointee of President Reagan's, and he then clerked for Justice Ruth Bader Ginsburg on the Supreme Court.

Following his two clerkships he spent a year in private practice at a very prestigious law firm, Munger, Tolles & Olson, and then moved into public service as a Federal prosecutor in 1997. He has prosecuted a broad array of crimes, including bank robberies, firearms offenses, immigration violations, alien smuggling, and various types of fraud.

He has served in the Major Fraud section of the Criminal Division, focusing on white collar crime. Among his many cases, he successfully prosecuted the first case for online auction fraud on Ebay in California. As a Federal prosecutor, he tried seven cases to verdict. He appeared in court frequently, typically several times a week.

He also argued for cases before the Ninth Circuit. In one such case, a cocaine dealer had already convinced a State court that a drug seizure had violated his Fourth Amendment rights. But Mr. Watford prevailed on appeal, forcing the dealer to forfeit over \$100,000 in drug proceeds.

In 2000, he rejoined the firm Munger, Tolles & Olson, where he is a current partner. This is one of the premier appellate law firms in California. Mr. Watford has focused on appellate litigation at Munger for the last 10 years. In total, he has argued 21 cases in the appellate courts. He has also appeared as counsel in over 20 cases in the United States Supreme Court.

Like most law firms, Munger's docket is dominated by business litigation, thus, the focus of his work has been appellate litigation for business clients. For example, Mr. Watford represents Verizon Communications in a consumer class action that has already seen one appeal to the Ninth Circuit.

He represented the technology company Rambus in two complex patent infringement cases, including on appeal. He also represented Shell Oil in an antitrust case. After Shell lost in the Ninth Circuit, Watford and his colleagues at Munger won a 9-0 reversal in the United States Supreme Court.

He has also represented numerous other American businesses: the Coca-Cola Company, Berkshire Hathaway, as well as business executives, nonprofits, and municipal government agencies. His extensive appellate experience will serve him well on the Ninth Circuit.

Beyond his legal practice he has shown an admirable dedication to the community, as well as to the judiciary. He has been a board member and treasurer of Neighborhood Legal Services of Los Angeles County, an organization that provides legal representation to more than 100,000 people each year.

He has been an active member of the American Bar. He was cochair of the ABA's Appellate Practice Committee, and he served on the Amicus Committee, as well as the Practitioners' Reading Group of the Standing Committee on the Federal Judiciary.

For 6 years, he served on the Magistrate Judge Merit Selection Panel in the Central District of California, assisting the District

Court in choosing highly qualified lawyers to serve as magistrate judges. He is also well-regarded by attorneys on both sides of the aisle.

Jeremy Rosen, former president of the Los Angeles chapter of the Federalist Society says that Watford is “open-minded and fair” and that he is “a brilliant person and a gifted appellate lawyer.”

Daniel Collins, a colleague of Mr. Watford, clerked for Justice Antonin Scalia and worked in the Justice Department during the administration of President George W. Bush. Mr. Collins says Watford is “incredibly intelligent and has solid integrity and great judgment.” He says that Watford “embodies the definition of judicial temperament: very level-headed and even-keeled.” I believe that Paul Watford will make an excellent addition to the Ninth Circuit and I urge my colleagues to support his nomination.

Thank you very much, Mr. Chairman.

Senator WHITEHOUSE. Thank you, Senator.

May I ask now for Mr. Watford to come forward to be sworn?

[Whereupon, the nominee was duly sworn.]

Senator WHITEHOUSE. Please be seated.

We have the happy tradition in these hearings of beginning by allowing the nominee to make introduction of family and friends who are present, and I would invite you, Mr. Watford, to do that now.

STATEMENT OF PAUL T. WATFORD, NOMINEE TO BE UNITED STATES CIRCUIT JUDGE FOR THE NINTH DISTRICT

Mr. WATFORD. Thank you very much, Mr. Chairman.

Senator WHITEHOUSE. Is your microphone on?

Mr. WATFORD. Thank you very much. I would like to first thank Senator Feinstein for that very kind introduction. I would like to thank Senator Feinstein, as well as Senator Boxer, for their strong support of my nomination. I am very grateful for that.

I would like to thank the Committee for scheduling this hearing.

It is a tremendous honor to be here. And I would of course also like to thank the President for nominating me for this position.

I have a couple of introductions I would like to make, if I could.

I have several close friends and two of my former partners, in fact, who are here with me at the hearing. I’m very grateful for their support. I have a number of family members, friends, and colleagues who are watching via the webcast that are up early in California this morning to watch. I am happy that they were able to see the proceedings.

But most significantly, I would like to introduce my wife Sherry, who is seated just to my right. We have been married for 22 years now and she is just the most supportive spouse anyone could ask for. I am very lucky to be married to her and I am thrilled that she could be here.

And other than that, I don’t have any further introductory remarks.

I’d be happy to answer the Committee’s questions.

Senator WHITEHOUSE. Thank you, Mr. Watford. Well, you certainly come with a gold-plated appellate resume, from an editor of your Law Review, to the Order of the Coif, to clerking for a Circuit Court of Appeals judge, to clerking for a Supreme Court judge, to co-chairing the ABA Appellate Practice Committee. It would be hard to quarrel with those qualifications, and so I am very delighted

that you're here. I note that there is not a significant attendance, which for somebody in your position is a very good sign.

Senator FEINSTEIN. Yes, it is.

Senator WHITEHOUSE. Non-conversy. That's what you want. You want the Chairman, the Ranking Member, and the member on the Committee from your home State, and that is what you have and no more. So, don't be discouraged by the fact that you haven't attracted a bigger crowd, be encouraged by that fact.

I want to just ask you two questions. One has to do with the role of appellate courts with respect to findings of fact. Could you describe what role appellate courts have in making findings of fact, and if an appellate court does make findings of fact, what sort of deference those findings are entitled to higher up in the appellate spectrum or on review or with respect to later precedent?

Mr. WATFORD. Sure. Well, I think as a general matter appellate courts don't have any role in finding facts. The facts are usually found at the District Court level and the appellate court would typically review the record when it comes up on appeal and, again, typically would give great deference to the factual findings that the trial court made.

I can't think of really any circumstance where an appellate court in the first instance would be called upon to make its own findings of fact.

Senator WHITEHOUSE. At least not properly.

Mr. WATFORD. At least not properly. That's exactly right.

Senator WHITEHOUSE. Very good.

The other thing I'd like to ask you about is the role of the jury, not just as a fact finder—and it is one of the ways in which finding of fact takes place in our judicial system—but also more broadly within the constellation of government institutions that are constitution established. What is your view about the role of the jury as an institution of government, of liberty, of protecting rights, as a part of the Constitutional process, not just a part of the legal process?

Mr. WATFORD. Well, I think the jury has an extremely important role to play in our system of government. It is one of the reasons why the right to jury trial was protected in the Bill of Rights. The Founders viewed it as an essential protector of liberty. I, you know, had the privilege of appearing before juries on behalf of the United States and have seen the jury system work up close, and it's one of the most awesome institutions to see in action because you take, literally, 12 random people from the community who don't know one another, don't know any of the parties involved, and at least in criminal cases are charged with a very significant responsibility of deciding whether somebody should be deprived of their liberty. And it's—again, as you—as you indicated, it's one of the real foundational protections our system of government provides for—especially for people accused of crimes, that there is this intermediary between the government and them being deprived of their liberty, and that's the jury.

Senator WHITEHOUSE. Good. Well, I can't ask you to make any promises or pledges about what you will do as a member of the Ninth Circuit, but given what I think is that common and accepted understanding of the role of jury, I hope that as you serve the people

of the Ninth Circuit in this role, assuming that you are confirmed, that you will not view with equanimity efforts that deprive people of access to the jury, given its core constitutional role. Can you just say a quick word about what you did as an AUSA? I was a U.S. Attorney and I always admired the professional staff that I had the chance to work with. Where did you work, and what were you assigned to, and what did you do?

Mr. WATFORD. Well, I was an Assistant U.S. Attorney in Los Angeles for the Central District of California. The rotation we have in that office, is you spend a year on what's called Rookie Row, handling just pretty much anything that comes in the door, all post-indictment cases.

Senator WHITEHOUSE. Yes.

Mr. WATFORD. So I handled a wide, wide variety of——

Senator WHITEHOUSE. Gun cases, drug cases, the sort of standard——

Mr. WATFORD. Exactly.

Senator WHITEHOUSE. Yes.

Mr. WATFORD. We then at that time moved into a section called Complaints, where pretty much for about 6 months all you did were search warrants, arrest warrants, indictments, that kind of thing. You didn't actually try any cases. And after that, I moved to the Major Fraud section, where I focused primarily on white collar crime.

Senator WHITEHOUSE. As a line prosecutor, not as an appellate advocate?

Mr. WATFORD. That's right. That's right. We did have a separate appellate section within the office, but I was not a member of that section. I got to know the people quite well in that section because I had a real strong interest even then in appellate work and often asked to be assigned to additional appeals.

Senator WHITEHOUSE. Good. Well, I wish you well as you go forward. I will ask unanimous consent that Chairman Leahy's statement in support of your nomination be incorporated into the record. Without objection, it will be.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Senator WHITEHOUSE. I turn to the distinguished Ranking Member, Senator Grassley.

Senator GRASSLEY. You signified you don't have any more questions. If I take more than 10 minutes, or I mean more than 5 minutes, is that OK?

Senator WHITEHOUSE. OK.

Senator GRASSLEY. OK. Thank you.

Senator WHITEHOUSE. We can have multiple rounds and I'll just have not much in my round.

Senator GRASSLEY. OK. OK. Well, I'm not saying you shouldn't have. I just wanted to know. I know we want to get this done quickly.

I want to ask some of your thinking about some of the immigration cases that you've argued. On July 14th last year you gave a speech on why the notable Arizona statutes were unconstitutional. This was in addition to your work as pro bono counsel for the plaintiffs of Friendly House v. Whiting that opposed that Arizona law. You also worked on a brief for Friendly House plaintiffs in

U.S. v. Arizona. In *Friendly House v. Whiting* you argued the statute violated the First Amendment by making it illegal for persons in the U.S. unlawfully to apply for work, solicit employment, or accept any work in Arizona.

The District Court dismissed the claim, stating “individuals who are unlawfully present in the United States and unauthorized to work do not have a right to solicit work.” So I have four questions that follow on this entry.

Could you explain your legal reasoning behind the argument that prohibiting people here illegally from soliciting work is a First Amendment violation?

Mr. WATFORD. Sure, Senator. I’d be happy to address that. The work solicitation provisions there that we challenged in the lawsuit were—they were in fact directed just at immigrants who were unauthorized to work, but the arguments that were presented there actually overlapped quite a bit with another Ninth Circuit case. The *City of Redondo Beach* case was another case directed not specifically at people who were in the country unauthorized to work, but who would gather at day laborer sites to try to solicit work. There was quite an ongoing battle within the Ninth Circuit over whether those types of laws, as a general matter, violated the First Amendment.

Initially a panel of the Ninth Circuit ruled that those laws were OK, and in fact when we first filed the complaint in the *Friendly House* case we actually withdrew the First Amendment claims in light of this recent Ninth Circuit panel decision that came down. What happened, though, was that the Ninth Circuit granted en banc review in that case and ultimately reversed the three-judge panel’s decision. At that point we asked the judge to reinstate the First Amendment claims, and I believe those claims are now still pending.

I will be honest with you, Senator, my involvement in the case lasted pretty much only through the filing of the preliminary injunction motion. I was brought in at the request of one of our senior partners at the firm, really to help him think through the legal issues and to help edit that particular brief.

Once we filed the preliminary injunction motion, however, as you know, the United States filed its own action and at that point the District Court really paid—focused all of its attention on the Federal Government’s suit.

Senator GRASSLEY. OK. My second question in regard to that opening I gave: what constitutional protections do you think that undocumented persons should be afforded in U.S. courts?

Mr. WATFORD. Well, as a—I guess I won’t try to offer any kind of a personal view. I would obviously have to follow whatever binding precedent was established by the Supreme Court or the Ninth Circuit in addressing that question.

I don’t know—I can’t tell you off the top of my head the full range of constitutional rights undocumented immigrants might have, but I do know that at least with respect to the preemption arguments that we made in the *Friendly House* suit, that there is, at least under existing Supreme Court precedent—I think there are strong arguments that an individual State doesn’t have the authority to set its own immigration policy, and those are really—the preemption

arguments were the main focus of the lawsuit.

Senator GRASSLEY. I think the most important part of the answer you just gave me, if I could bring emphasis to it, is that you feel very much compelled to follow Ninth—or Supreme Court precedents as a member of the Ninth Circuit Court of Appeals?

Mr. WATFORD. Absolutely.

Senator GRASSLEY. And the reason I might say that, as you probably know, and I don't know the exact figures, but one time it was 37 out of 39 appeals from the Ninth Circuit went to the Supreme Court that were overturned.

Mr. WATFORD. Yes.

Senator GRASSLEY. And I would think people in the Ninth Circuit wouldn't be particularly proud of that. But I don't know how they feel about it, but that's just how I view it as a non-lawyer.

Mr. WATFORD. Sure.

Senator GRASSLEY. Following up then on the same introduction I gave, do you believe States lack the right to police their own borders and detain or investigate persons who may be residing there illegally?

Mr. WATFORD. Well, again, let me just speak in terms of what existing law provides. There are certain respects in which States can cooperate with the Federal Government in enforcing Federal immigration law. There's no question about that. Congress has enacted several statutes that provide for the mechanisms through which that kind of cooperation can take place.

I think the arguments that we were making in the Friendly House case, though, turned on the fact that Arizona was not attempting to cooperate with the Federal Government, Arizona felt—perhaps rightly—I don't take any position on that—that the Federal Government's immigration policy was not working for the State and therefore attempted to establish its own immigration policy. That is really the focus of the argument we made, is that immigration policy has to be established at the national level. That's what Congress has directed. It has allowed the States to participate in the enforcement of immigration law, but only in certain very narrow circumstances that didn't apply in the Friendly House case.

Senator GRASSLEY. OK. Following on the same introduction I gave to this series of questions and getting to the point of your decision to recuse or not recuse, the Supreme Court recently agreed to hear the appeal on U.S. v. Arizona. Justice Kagan recused herself, assumedly due to her work as Solicitor General when the Federal Government originally filed the case.

If a challenge to a State immigration statute or practice were to come before you in the Ninth Circuit, how would you handle it, considering your past experiences litigating and commenting on these cases? Would you recuse yourself?

Mr. WATFORD. Well, certainly if any aspect of the Arizona law came back before the Ninth Circuit, and it may well, I would certainly have to recuse myself from any involvement in that case, I have no doubt about that. If another State passed a very similar law that raised the same sorts of preemption issues, I would have to consider very carefully whether to recuse myself.

I know that there are statutes and codes of conduct that govern

that. The main question would be whether my impartiality could reasonably be subject to question, and if it could I would have no hesitation in recusing myself. I know that there is a Committee within the Ninth Circuit that one can consult on questions of that sort, and I would certainly take advantage of that if the question came up.

Senator GRASSLEY. Now I will defer to the Chairman. I've got——

Senator WHITEHOUSE. Go ahead.

Senator GRASSLEY. I've only got one other series of questions.

Senator WHITEHOUSE. Go ahead.

Senator GRASSLEY. Go ahead?

Senator WHITEHOUSE. Proceed.

Senator GRASSLEY. OK.

The brief filed by your client, Friendly House v. Whiting, cited reaction from the international community to the passage of the Senate bill—or this Arizona bill 1070. Specifically, it noted two travel advisories enacted by Mexico and El Salvador that said SB 1070 “threatens basic notions of justice.”

So three follow-up questions to that introduction: do you think the opinions of foreign leaders should have an impact on judicial decisions in U.S. Federal courts?

Mr. WATFORD. No. As a general matter, no.

Senator GRASSLEY. OK.

Then let me follow up then. Why did you include statements by those foreign governments in your brief?

Mr. WATFORD. Well, I'm hesitating only because when you say “why did I include them”——

Senator GRASSLEY. OK.

Mr. WATFORD. My role really was to edit that brief.

Senator GRASSLEY. OK.

Mr. WATFORD. I was not the principal drafter of it, so I don't want to take responsibility, I guess, in my own right for including them. But I can tell you that one of the arguments that the United States made in its own motion and that echoed—or our arguments echoed some of the arguments the United States made, was that the reason immigration law needs to be established at the national level is that it has very serious foreign affairs or foreign relations implications, some of those being, how are our citizens treated when they're in a foreign country and don't have legal status, obviously, to be here.

The concern, I think, was that if Arizona's law were applied to the maximum extent it could be, there were folks who were here in the country lawfully, right, who we had allowed from other countries to come here and stay, either temporarily or as permanent residents, who would be subjected to adverse treatment under the law, and in return that could cause foreign countries to retaliate against our citizens when our citizens were in their countries.

Senator GRASSLEY. OK.

Then I could add to that part of my question, taking off on what you said. I'm sorry, I lost my train of thought.

Mr. WATFORD. OK.

Senator GRASSLEY. So I may come back to it.

C, here. If the international community had an overwhelmingly

negative reaction to a challenge to a Federal or State statute that found its way to your court, how strongly would you consider the international community's opinion in your decision-making process?

Mr. WATFORD. I would not consider the international community's reaction in any way. What I would consider, however, is if the United States itself, the Federal Government, came in and said this law, or at least applications of this law, are going to have serious foreign affairs implications for our Nation, if the Federal Government expressed that concern I think that is a relevant consideration that needs to be taken into account in some situations, some circumstances. But I don't think the fact that foreign leaders themselves are voicing concerns, standing on its own, should have any impact on a United States judge—a United States judge—judge's decision.

Senator GRASSLEY. I will submit some questions for answer in writing, please.

Mr. WATFORD. OK.

Senator GRASSLEY. And let me suggest to you, you'll probably do it anyway, and answer them as forthrightly as you can and as completely as you can. But sometimes, needlessly, nominees are held up just because they don't answer questions or answer them fully. So try to get that done. And even after your nomination might go to the floor, you need to consider that for members that maybe aren't on this Committee.

Mr. WATFORD. OK.

Senator GRASSLEY. Although it doesn't happen too often, but it does happen sometimes.

[The questions appear under the questions and answers.]

Senator WHITEHOUSE. So just to—I'd like to just follow-up briefly on the exchange that you just had with Senator Grassley. Would it be fair to characterize your answer as saying that as a judicial matter the opinion of foreign governments carries no weight, but to the extent that as a judge you would be evaluating the position, the authorities, the determinations made by the executive branch of government, you could take into account as a fact what the executive branch is telling you about the consequences of actions or the importance of whatever is happening internationally to the discharge of executive authorities?

Mr. WATFORD. Yes. That is an exact summary of the position I tried to articulate—

Senator WHITEHOUSE. Yes.

Mr. WATFORD [continuing]. Maybe not as well as you did. And Senator—Mr. Chairman, I would just add to that, I've been involved in cases in which the courts have actually invited the State Department to submit its views when a particular issue came up that seemed to have very serious foreign affairs implications. That's something that I've seen the courts do, and it does seem to me that it's appropriate in that circumstance.

Senator WHITEHOUSE. Because there are times when the Constitution obliges the judiciary to defer to the executive branch of government, and at those times the opinion of the executive branch of government is of significance, of relevance.

Mr. WATFORD. That's exactly right.

Senator WHITEHOUSE. And with respect to constitutional rights

for undocumented persons, when you were prosecuting folks as an AUSA there was no separate standard for undocumented persons with respect to their constitutional right to a trial, the constitutional right to have search and seizure restrictions, the various constitutional boundaries that prosecutors operate within.

Mr. WATFORD. That's correct.

Senator WHITEHOUSE. OK.

Senator GRASSLEY. I remember now what I wanted to ask you on that second part. You said you edited that document and didn't write it. I don't know what authority editors have, but would you have thought about at the time of saying that these statements in regard to foreign points of view and foreign law shouldn't have been—or in this case was travel advisories—maybe shouldn't have been referenced?

Mr. WATFORD. I certainly could have. If that's what you're asking, yes, I certainly could have in my role as an editor.

Senator GRASSLEY. Yes. But you didn't find it important to do that?

Mr. WATFORD. No, Senator, I did not. And as I said, the reason for that is that the United States itself had asserted there that there were foreign affairs implications that arose from enforcement of this law and those statements that we referenced, I think, in the brief were indicative of that.

Senator GRASSLEY. OK. Thank you. And I'll appreciate answers in writing.

Mr. WATFORD. Thank you, Senator.

Senator WHITEHOUSE. Well, Mr. Watford, thank you. I appreciate this. I would highlight, emphasize, and double underline what Senator Grassley warned you about the importance of prompt answers.

The more quickly the written answers can be provided to us, the more quickly your nomination can move forward.

Let me congratulate you on your period of service to our country.

Let me hope that it is precedent to a longer period of service to our country as a judge on the Ninth Circuit Court of Appeals. As I said, you are as gold-plated on the record and on your resume a candidate as one could hope for for United States Circuit Court of Appeals judge. I think you've acquitted yourself very well in this hearing and I look forward to supporting your nomination as we go forward.

May the rest of it be as uneventful as today's hearing.

Thank you very much. We'll keep the record open for 1 week in the event of any further questions or statements that anybody wants to put into the record, but subject to that, the hearing is adjourned.

JAMES WYNN
WEDNESDAY, DECEMBER 16, 2009
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 3 p.m., Room 226, Dirksen Senate Office Building, Hon. Benjamin A. Cardin presiding. Present: Senators Klobuchar, Specter, Franken, Sessions and Hatch.

OPENING STATEMENT OF HON. BENJAMIN L. CARDIN, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator CARDIN. The Committee will come to order. Let me thank Chairman Leahy for allowing me to chair this hearing.

I first want to acknowledge two of my former colleagues from the House of Representatives. I do that, Senator Burr, because I served a lot longer in the House than I have been in the Senate. So it was nice that we have a hearing of North Carolina judges to bring Congressman Watt and Congressman Butterfield to our Committee room. We welcome both of them to the Committee room.

Judge Wynn, I want you to know one thing. I was on a plane ride with Congressman Butterfield, for a long plane ride, and for hours he was telling me about you. So you have a good friend in Congressman Butterfield and he assured me that you are going to make a great addition to the Fourth Circuit.

I take special interest in the court circuit. It is a Fourth Circuit in which, of course, Maryland is a party to. We currently have four vacancies. I guess it is about 20 to 25 percent of the workload. So it is critically important that we move forward on the confirmation process in the Fourth Circuit.

I am pleased that we have been able to confirm recently two additions to the Fourth Circuit, last year and this year, and that we have another person who has been approved by our Committee. But we have already confirmed Judge Agee from Virginia and Judge Davis from Maryland, and we have had a hearing on Justice Keenan from Virginia, who has received the voice vote from our Committee and we are hoping that she can be confirmed prior to the end of this session of Congress.

It is important that we move forward with these nominations. As I evaluate judicial candidates, I use several criteria. First, I believe judicial nominees must have an appreciation for the Constitution and the protections it provides to every American. Second, I believe each nominee must embrace a judicial philosophy that reflects mainstream American values, not narrow ideological interests. Third, I believe a judicial nominee must respect the role and responsibilities of each branch of government. Finally, I look to a strong commitment and passion for the continued progress for civil rights protection.

We are fortunate to have two nominees before us who have devoted a good deal of their life to public service and we thank them for their public service and we thank their families, because we know this is a joint sacrifice.

Judge James Wynn comes to this Committee with a broad range of both civilian and military judicial experience. Judge Wynn currently

sits on the North Carolina Court of Appeals, the state's intermediate appellate court.

Prior to taking the bench in 1990, he served as an appellate public defender and worked in private practice. Judge Wynn is also a certified military trial judge and a captain in the U.S. Navy Reserves. He served on active duty in the U.S. Navy JAG Corps from 1979 to 1983. As a military lawyer, he tried over 100 court-martial cases before sitting as a military judge.

He has been awarded the Meritorious Service Medal three times, the Navy Commendation Medal twice, the Navy Reserve Medal, the National Defense Service Medal, and the Global War on Terrorism Medal.

Congratulations. That is quite an impressive array.

He is chair of the American Bar Association Judicial Division, a former chair of the association's Appellate Judges Conference, and a member of the standing Committee on Minorities in the Judiciary. He received his BA from the University of North Carolina-Chapel Hill, his JD from Marquette University Law School, and a master's of law from the University of Virginia School of Law. Quite impressive. He has received a unanimous well qualified recommendation from the American Bar Association.

So we thank both of you for your willingness to continue to serve in the public. I want to compliment particularly your two Senators, one a Democrat, one a Republican, working together to bring us the very best for our consideration. It is a model for other states to follow and I compliment both Senator Burr and Senator Hagan.

We will start with the introductions by your two Senators.

Senator Burr.

Senator Burr, just for one second. I see that Senator Sessions has arrived. If I could yield first to Senator Sessions and then we will——

Senator BURR. Gladly.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you. Sorry to be running late. We just had an Armed Services hearing I had to be a part of.

Mr. Chairman, it is good to be with you. We will have two nominees today for hearing, which is unusual and not something we do often, but it is something we were requested to do. And the nominees sort of have come forward together for the same circuit and the desire, I understand, is to keep them together.

So I think under those circumstances, I have agreed to go forward with both nominees today and I look forward to a good hearing.

Senator CARDIN. Senator Burr.

PRESENTATION OF JAMES A. WYNN, JR., NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE FOURTH CIRCUIT AND ALBERT DIAZ, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE FOURTH CIRCUIT BY HON. RICHARD BURR, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator BURR. Thank you, Mr. Chairman. I hope to solve 50 percent of the Fourth Circuit vacancies with a North Carolina solution.

I thank you and Senator Sessions. I want to welcome not just our nominees, but I want to welcome their family and their friends who are here to celebrate in this day.

It is a great pleasure for me to introduce not just one, but two nominees for the Fourth Circuit court.

Judge Wynn and Judge Diaz may be unique in the legal community in which they both serve not only because of their impressive credentials, but, also, their outstanding character and commitment to public service.

Both of these men have served their country in the military and I am particularly grateful to them for that service.

Judge Wynn grew up on a farm in Robertsonville, North Carolina. He has six brothers and a sister, some of whom are here today. He says he learned the values of hard work helping out on the family farm, where his family still gathers for regular reunions. He joined the U.S. Navy Judge Advocate General Corps in 1979, upon graduation. He always had a desire to serve in the military and thought that that might be his last opportunity to do so.

Upon completing his commitment to active duty, Judge Wynn's mentors in the JAG Corps convinced him to become a Reservist and he continued that duty into much of his time as a judge. In August 2009, he retired as a Navy captain with 30 years' service. Throughout his career, he has shown a continued commitment to learning. Although on the bench and more than 15 years into his legal career, Judge Wynn decided to continue his legal education by pursuing a master's degree in judicial process. He even spent 8 years studying the human genome project.

Judge Wynn is a deacon of the Providence Missionary Baptist Church in Robertsonville, North Carolina and every Sunday, he drives 45 miles to pick up a fellow deacon, his father, James Andrew Wynn, Sr., who is here with us today and 87 years old.

Welcome, Mr. Wynn.

Judge Wynn currently serves on the North Carolina Court of Appeals. His wife, Jacqueline, and two of their three children, Javius and Jaeander, are here today, as are many of his fellow JAG officers. His middle son, Conlan, could not be here today because of college exams. I am sure he would rather be here with us.

Mr. Chairman, I am proud to present to the Committee two distinguished nominees for the Fourth Circuit court and I suggest that this Committee look for an expedited review and referral to the full Senate so that that deficiency on the Fourth Circuit can be filled.

I thank the Chair and I thank the Ranking Member.

[The prepared statement of Senator Burr appears as a submission for the record.]

Senator CARDIN. And we thank you very much for your support. Senator Hagan.

PRESENTATION OF JAMES A. WYNN, JR., NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE FOURTH CIRCUIT AND ALBERT DIAZ, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE FOURTH CIRCUIT BY HON. KAY HAGAN, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator HAGAN. Thank you, Mr. Chairman. I, too, want to welcome Judges James Wynn and Albert Diaz and thank both of them for being here today and for the service that they have both given our state and nation over the past several years.

I also want to thank President Obama for selecting such exemplary

nominees. And I sincerely want to extend my gratitude to my esteemed colleague, Senator Richard Burr, for working so hard with me to ensure that North Carolina has adequate and highly capable representation on the Fourth Circuit.

These two judges are exactly what we need on the Fourth Circuit Court of Appeals, for several reasons, and you have just heard Senator Burr's excellent qualities and biographies of these two esteemed gentlemen, and I will not go any further into their biographies.

I also see Congressman Mel Watt here, who so ably recognizes the citizens in North Carolina.

But when I first came to the U.S. Senate earlier this year, I had high hopes for increasing the number——

Senator CARDIN. Congressman Butterfield is also there.

Senator HAGAN. I did not see Congressman Butterfield. And Congressman Butterfield—I am so sorry—also, who so ably represents his district in North Carolina.

But when I first came to the Senate earlier this year, I had high hopes for increasing the number of North Carolinians on this court.

North Carolina is the fastest-growing and largest state served by the Fourth Circuit; yet, only two of the 15 seats were filled by the abundant talent from our state. And over the past century, North Carolina has had fewer total judges on this court than any other state.

Furthermore, there have been inexcusable vacancies on this court throughout history and given that the United States Supreme Court only reviews 1 percent of the cases it receives, the Fourth Circuit is the last stop for almost all Federal cases in the region, and we must bring this court back to its full strength.

Since 1990, when this circuit was granted 15 seats, it has never had 15 active judges. But specifically, there has been a history of partisan bickering over the vacancies on the Fourth Circuit.

But with these nominees and this process, we are changing the course of history and I am very excited about confirming these judges.

However, I know that members of this Committee will be less interested in these historical issues than they will be in the particular qualifications and experiences of these two accomplished judges.

I am proud to note that both of them have received unanimous ratings of well qualified from the American Bar Association. They both bring a wealth of experience in the courtroom, advising courts and judges and serving in the armed services.

These judges show respect for the law and apply it as it is written.

In a recent dissenting opinion, Judge Wynn wrote, “Judicial prudence requires us to leave these policy questions to our Legislative and executive branches of government. Our role is to apply the law, not to make it.”

Editorials in newspapers throughout North Carolina have praised these nominations. The Charlotte Observer said, “Judges Wynn and Diaz are widely regarded as intelligent, ethical judges, who have won respect for their judicial and military careers. They are the kind of judges the Federal bench needs. Their quality is so unquestioned that only partisanship could stall their nominations.”

The Raleigh News and Observer said, “There appears to be no

good reason they shouldn't be moved through the confirmation process with dispatch.'"

And I am honored to have the opportunity to play some role in this process and that we are now moving toward putting Judge Diaz and Judge Wynn on the Fourth Circuit bench.

I want to express my sincere gratitude to this Committee for holding this hearing today.

Thank you, Mr. Chairman and Mr. Ranking Member. Thank you very much.

[The prepared statement of Senator Hagan appears as a submission for the record.]

Senator CARDIN. I want to thank both Senator Hagan and Senator Burr not only for their testimony here today and their introductions, but the manner in which these nominees have been brought forward.

I particularly want to thank Senator Sessions for accommodating the fact that we could take two appellate court judges in one hearing, because that is unusual. We normally want to have a separate hearing on each of our appellate judges.

So I want to thank Senator Sessions. I think it reflects the fact that the two Senators worked together in a nonpartisan manner to bring us forward the nominees.

So congratulations to both of you.

We will now proceed to the hearing of the two judges, if they would come forward please and remaining standing, if you would, please.

We ask that you take an oath, which is traditional in the Judiciary Committee.

[Nominees sworn.]

Senator CARDIN. Please have a seat. Judge Wynn, we will start with you. Glad to hear from you. And I think your family has already been introduced, but if you care to do it again, certainly, they deserve it.

STATEMENT OF JAMES A. WYNN, JR., NOMINEE TO BE UNITED STATES CIRCUIT JUDGE FOR THE FOURTH CIRCUIT

Judge WYNN. [Off microphone] and allowing us this opportunity to appear before this Committee. I am particularly thankful, of course, to my God for this opportunity and I thank my President Obama for this opportunity. And I thank the judges of my court, the North Carolina Court of Appeals and the Supreme Court of North Carolina, my colleagues who have helped me through the years to be a better judge and a good judge, and my former colleagues. I am particularly pleased, of course, to have my father here, who has already been mentioned. I am pleased to have my wife, Jacqueline, and two of my three sons, Javius and Jaeander. Of course, Conlan could not be here for the reason stated, that he is taking an exam.

I am happy to have my sister, Angela, here and her husband, Arthur.

My sister, Anita, is also here and, unfortunately, my sisters, Joan and Romaine and her husband, Benny, could not be here, nor could my brothers, Reggie and Arnie, be here.

In addition, I believe my niece, April, is in the audience here and I hope I am not forgetting someone behind me here.

But I do want to make special note of my Navy friends who are

here, because the Judge Advocate General of the Navy said he would attempt to show up. He is having a meeting with the Undersecretary at this time, but he would be coming.

I know that Rear Admiral Steve Talson is here, who is the Deputy JAG in charge of Reserve Affairs; and, a very special friend of mine, who is a line officer in the Navy, Captain Glen Flanagan, who commanded two major ships, a nuclear cruiser and a frigate during his time. We have been friends for over 30 years and I am particularly happy he was able to make it.

I believe Chief Judge Andy Effron of the Court of Appeals-Armed Forces will also be here. And I saw a number of surprise guests here, some of my former classmates. I know that Justice Timmons-Goodson, who is on our Supreme Court, has joined us and a number of my other friends are here.

I see in the back of the court—earlier—saw them in the back of the court earlier, folks from the Troopers Association, the North Carolina law enforcement group, have come, also, and a number of other friends.

And I hope, if I missed anybody behind me, please charge that not to my heart, just to the fact that perhaps the moment is consuming me.

[The biographical information follows.]

Senator CARDIN. Thank you. Let me just inform the people that are here that a vote has started on the floor of the U.S. Senate.

I am going to yield to Senator Sessions to allow him to go first. We anticipate that we will be able to keep the hearing going during the vote. There is only one vote that is scheduled. We may have to take a short recess, but we hope to keep the hearing open.

Senator Sessions.

Senator SESSIONS. [Off microphone.] While both of the nominees have impressive backgrounds, including extensive service to their country, the Senate does have a constitutional duty to review these nominees carefully. I would just say that, of course, your backgrounds have been examined. FBI has done their background work.

The ABA has done theirs. The President and Department of Justice have done theirs, and members of the staffs of the Committee have also looked into that. You would not be here if we were not making some progress through those investigations. This is a lifetime appointment and it requires that kind of review.

I am pleased to see that both nominees have the support of your home state Senators. That means a lot to all of us. You have got two Senators who have spent time at this and they have strongly supported you and that is valuable to us.

Both Judge Diaz and Judge Wynn were nominated by the President on November 4, 2009. So this is a quick turnaround for any circuit court nominee. It is especially quick for a nominee to the Fourth Circuit.

Another of President Bush's nominees, Chief Judge Robert Conrad, who was chosen by Attorney General Janet Reno to conduct a sensitive investigation, out of all the United States attorneys in the country, who was rated highly by the bar association, was nominated for the seat for which Judge Wynn is now nominated, he waited over 500 days for a hearing that never came.

So there are other examples, I think, of unreasonable delay and

obstruction, but I am not going to talk about that today. How about that? I just want to say that I am pleased that we could move you forward at what is really a fairly rapid pace, I have to say.

Both of your records have been examined and I will not go into a lot of detail. I did note a concern, as a former prosecutor, Judge Wynn, on a number of your cases involving search and seizure issues that are troubling to me.

In McClendon, you argued in dissent that it violated the Fourth Amendment to detain an individual who was stopped for speeding, appeared nervous, gave inconsistent and vague answers regarding his destination and could not produce a registration card for the vehicle. An eventual search yielded 50 pounds of marijuana. The Supreme Court of North Carolina affirmed the majority opinion in that case and not your view.

In State v. Brooks, you held that approaching a parked car and talking with the driver constituted an investigatory stop, requiring reasonable suspicion for the purposes of the Fourth Amendment. In Brooks, a state bureau investigation agent was executing a search warrant at a business, where a car was parked. When he walked over to the car and engaged the driver in conversation, he noticed an empty gun holster next to the driver. When he asked where the gun was located, the defendant told the officer he was sitting on it. After seizing the gun, the officer obtained consent to search the car and located drugs.

The North Carolina Supreme Court unanimously reversed your decision that the officer's actions amounted to an investigatory stop that required a higher level of proof, which was reasonable suspicion. So I would just say that these are fact-intensive cases. People can disagree or even make an error on occasion. Judges are not perfect. But when you have a lifetime appointment, unaccountable to the public, we do want your commitment that you will follow the law faithfully, regardless of whether you might agree with it or have a different view, and that would be some of the matters that we would be questioning today.

What do you think, Mr. Chairman, about the time?

Senator CARDIN. There is still some.

Senator SESSIONS. Judge Wynn, I mentioned those two cases. Would you tell me how you felt about them and your view of it, particularly after the court of appeals ruling?

Judge WYNN. Thank you, Senator. And I appreciate the opportunity to respond to the concerns that you have on those cases. I would note that during the tenure of my 19 years on the court, I have written perhaps close to 1,500 opinions and concurred in another 3,000 of them, and the vast majority of them the Supreme Court has affirmed, particularly in the criminal cases.

One of the unique things about the State of North Carolina, I don't think another state has this system, is that in order to get an appeal, as a matter of right, to the Supreme Court, a dissenting opinion from the court of appeals would put it there.

So quite often, as you indicated, where you have factual situations, where the issues are close, the Supreme Court has made it clear that a three-judge panel cannot certify that appeal to the Supreme Court. The only way it can get there on an appeal of right

would be by a dissenting judge.

Understanding this process and the limited role that an intermediate court plays in the State of North Carolina and the opportunity for this to be reviewed by the Supreme Court, there are instances in which there is a fuzziness in the law or unclearness in the law. It perhaps is helpful to have a word from the Supreme Court.

I will assure you that once the Supreme Court made its pronouncement in these cases, I followed that law to the letter thereafter and in every instance in which you have enumerated, it has been helpful for the court to understand how to proceed from that point on and there are no court cases after any of those cases that would appear where I have deviated to any degree from what the Supreme Court has mandated.

Senator SESSIONS. Well, thank you. That is a direct answer and I appreciate it. What about, both of you, we have Federal sentencing guidelines that are rather significant and reduce the freedom that judges in state court may have had with regard to sentencing.

Are you familiar with that, Judge Wynn, and are you committed to—how do you view, since the Supreme Court has reduced the binding nature of those guidelines, how do you feel about the general principle that sentences should be within the guideline range under normal circumstances?

Judge WYNN. Senator, again, thank you. And I recognize that you have a great deal of knowledge in terms of the legal system. One of the things that you know and, of course, I know is that over the years, there was complete discretion given to judges at times to sentence defendants to virtually any sentence, from probation to many years.

I have, for many years, thought it was quite wise, whenever the legislative process was in place, to limit that discretion to the extent that there would be some consistency in the types of sentences that would be awarded.

To the extent that the Supreme Court is interactive, of course, if I am selected, I will fully support the holdings of the Supreme Court and the rulings of Congress that are held by the Supreme Court to be constitutional.

Senator SESSIONS. Thank you. Both of you have dealt with lawyers and clients. Would you describe briefly your view about how an advocate ought to be treated in your courtroom and how you will treat them, if you are confirmed?

Judge Wynn.

Judge WYNN. Senator, again, thank you. Perhaps just as a matter of background, I grew up in a farm community in eastern North Carolina and I learned to respect, from my father and those around me, the individuals, no matter what path of life they came from. It has been my intent and my practice at every stage of being in the judiciary to appreciate and to respect the lawyers and the litigants that come to the court no matter what their backgrounds, to allow and afford them a full hearing, to provide for access to justice in every instance.

So I have attempted to and believe strongly in respecting individuals that come to the court and yielding and being as humbled as I can and recognizing the limited nature of my role as a judge is

not to be the person in a superior position, but the person who is there to adjudicate with a fair and impartial view.

Senator CARDIN. Thank you, Senator Sessions. We are going to need to take a brief recess because of the vote that is on the floor. I have been informed that we will not be able to continue the hearing at this time. So it will be a brief recess and we will be returning. [Whereupon, at 3:34, the Committee was recessed, to reconvene at 3:50.]

Senator CARDIN. The Judiciary Committee will come back into order, please. Again, we apologize for the recess. It was unavoidable due to a vote on the floor.

We are joined by Senator Franken. We welcome him to the Committee.

Let me ask, if I might start off with some questions and just point out what Senator Sessions pointed out, which I think is critically important. The confirmation hearing is part of the process.

Prior to your selection by the President, there was a long questionnaire that you had to fill out. I am sure it took you a long time.

You probably had to recall things in your background that you had long thought would never be relevant again in your life.

So we have a lot of material. You have written a lot of opinions.

You have given many speeches. All that has been reviewed by our staffs. We have summaries of that here.

So the confirmation hearing is one part of the confirmation process.

As Senator Sessions pointed out, this is the court of appeals, where most of the court decisions are going to be reached in the Judicial Branch of government, because the Supreme Court takes very few cases. And this is a lifetime appointment.

So we treat the confirmation hearings very seriously and the confirmation process very seriously. I say that knowing full well that

your backgrounds are incredible and your records are very strong.

But let me ask a question that was asked to you before, but I want you to elaborate a little bit more, and that is on your judicial philosophy, how you will go about reaching decisions and how your background will impact the way in which you go about evaluating the decisions of the cases that come before you.

Since, Judge Wynn, we have been working with you first usually on the questioning, because you were first to testify, I am going to call on Judge Diaz first. Judge Wynn.

Judge WYNN. Thank you, Senator. And I agree with Judge Diaz and his comments that have been made. The role of a judge is to follow the law, not make the law. And in my decisionmaking process, I seek to apply the applicable statutes, the constitutional law, relevant precedent based on precedents, and reach a decision in the cases.

Senator CARDIN. The Fourth Circuit is one of the most diversified circuits in our country. Just looking at the numbers, it consists, of course, as you know, of Maryland, Virginia, West Virginia, North Carolina, South Carolina. Twenty-two percent of the residents are African-American. In North Carolina, it is even more diverse; 32 percent are African-Americans.

So I want to talk a little bit about diversity and how important it is to have diversity on our bench. And a related issue, the oath that you take as a Federal judge requires you to render your judgment without respect to the wealth or poverty of the person, to give

equal justice to all, which, I would submit, is a goal that has not yet been reached in our system.

So my question is, how important is diversity in our bench and what does your background, your individual backgrounds, what role does that play in dispensing of your decisionmaking or your responsibilities on the bench?

Judge WYNN. Thank you, Senator. I think that the role of a judge, of course, first and foremost, is to follow the law, not make the law. In every instance, the judge should treat every litigant with fairness and with impartiality.

It is my belief that—and I call upon a recent case by the United States Supreme Court, in which Justice Scalia brought forth the indication of the judicial speech case. He indicated quite pointedly that judges come to the court quite often with preconceived notions on relevant issues of law and he said, and I quote, “You would hardly expect anything differently. You wouldn’t want a judge to be any different.”

I take that to mean that the opportunity to have a wide range of input on relevant legal issues is important, but in every instance, the ultimate role of a judge, regardless of the background of the judge, regardless of the experience, is to follow the law, not make the law, to treat litigants fairly, and provide open access to our courts.

Senator CARDIN. I thank both of you for those answers. One last point and then I will turn it over to Senator Franken. And that is that is, the importance of pro bono legal services.

I have read your resumes and your backgrounds and your answers to those questions that were compounded by the Committee.

As a judge, you cannot handle pro bono cases. But as a leader in the Judicial Branch, you have a responsibility for leadership in access to justice, regardless of wealth.

So how do you see the role you can play as an appellate court judge in promoting programs to provide equal access to justice? I am going to preface your answer by what was done by the head of the Maryland courts, the chief judge, when he required lawyers to report on their pro bono activities as part of their professional responsibility. He helped expand access in Maryland.

How do you see your role as an appellate court judge in helping us achieve the goal of equal access to our courts?

Judge WYNN. Thank you, Senator. And I, of course, agree with Judge Diaz’s comments. As a lawyer, I offered and provided a number of pro bono hours. In fact, I received an award from the North Carolina Bar Association one year for having provided pro bono services during that year.

As a judge, it has been incumbent upon me to reach back into the community, such as the one that I came from, out of Martin County, North Carolina, where, unfortunately, sometimes the economic times have made it very difficult in those times.

I have so many great friends and supporters there, and I especially feel a need to go back quite often and reach back into the community through the high schools and through community activities to help to educate about the legal process and to afford our citizens an opportunity to learn more about the judiciary and to offer more back to our community.

Senator CARDIN. Well, I thank both of you. I was very impressed with your backgrounds and very impressed by your appearance here today, and I wish you only the best.

I am going to turn the gavel over to Senator Franken. When he is completed, he will adjourn the Committee.

Senator FRANKEN. [Presiding] Thank you.

Senator CARDIN. You are chairman.

Senator FRANKEN. I guess, yes, I am chairman.

Senator CARDIN. Seniority moves quick around here.

Senator FRANKEN. Well, congratulations to both of you for your nominations. I want to go back to diversity again, because you are both military judges. Right?

Judge WYNN. That is correct, Senator.

Senator FRANKEN. Do you think that is a good idea to have two military judges on the same appellate court? That is not unusual, is it; or is it?

Judge WYNN. I am not sure in terms of how many individuals on the appellate courts have been former military judges. But I am certainly honored to be here with a fellow military judge who happened to be a Marine. I, of course, am Navy and I am quite honored that we are able to sit together in this opportunity.

Senator FRANKEN. How about if Army came in front of you?

Judge WYNN. Absolutely, sir. Absolutely.

Senator FRANKEN. Seriously, how do you think your experiences in the military inform your work as a judge not in the military and especially on an appeals court?

Judge WYNN. Well, I think the level of discipline and the level of respect that we have in the military—it is a very, very tight community. Whenever we had individuals who would come before the court, regardless of the crime, we ensured—we had to understand that these individuals had volunteered to serve in the military and that their rights were something that needed to be protected; but at the same time, military discipline is important.

And I think that in being able to serve as a military judge at bases literally around the country and around the world—and I might add that the Navy is composed both of the Marine and the Navy. So I had cases on Marine Corps bases, as well as Naval bases.

Senator FRANKEN. I was fascinated with Judge Wynn's answer on experience and talking about Justice Scalia's idea that, of course, you are going to come to the court with certain ideas about the law and that is what you want.

So sometimes we have this argument in this Committee about the role of diversity and it seems to me that when you talk about experience, I think it was Oliver Wendell Holmes who said experience is the law.

Help me, if you can, make this distinction where we have lots of nominees come before us who have said something like diversity is very important, experience is very important, and then we get a little pushback from people saying, "Ah, but you have to be completely neutral as a judge."

What is a good way to reconcile—how would you put reconciling those two?

Judge WYNN. Well, it looks like the Marine is deferring to the

Navy guy here, so I will start out, Senator. Thank you, Senator, for that question.

I think the important aspect that we have to understand is that the judiciary depends a great deal on the public confidence.

Alexander Hamilton I think was the one who said that—when he was talking about separation of powers, he said the legislature has the money, the executive power has the force, and the judiciary has neither. And I think what you can glean from that is that the power of the judiciary in terms of enforcing the decisions lie in the fact that the public has confidence and they trust the judiciary and they have confidence in the integrity of the judicial decisions; in other words, they respect them.

If they do not respect them, then enforcing them will be difficult.

And in order to respect and have public confidence, quite often, it may be necessary at least that the judiciary reflect at least an openness, at least some degree of diversity in terms of the individuals who may be there or the experiences.

The individuals who may come from rural communities or may come from urban communities or individuals of wealth or individuals of not so much wealth, to have a diversity of experience, I think most people can agree that, generally, that adds to the ultimate product, that is, yield, as a result of the decisionmaking process.

But ultimately, in every instance, regardless of the individuals who are there, the ultimate role of a judge is to follow the law, not make the law, not make it based on their past experiences, not make it based on things outside of that that is before them, but to use their best efforts to reach the results based upon the applicable law.

Senator FRANKEN. Well, I would like to thank both of you and congratulate both of you. Like Senator Cardin, I am incredibly impressed with your background and your experience.

We are going to keep the record open for 1 week for written questions, and our hearing is adjourned. Thank you, gentlemen.

Judge WYNN. Thank you, sir.